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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 51

HYMAN WAINER, LOUIS WAINER, GEORGE DAVIS ET AL., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 6, 1935.

CERTIORARI GRANTED JUNE 3, 1935.

IN THE

United States Circuit Court of Appeals
For the Seventh Circuit

No. 5708

HYMAN WAINER, LOUIS WAINER, GEORGE DAVIS, DONALD BLINK AND ED. LUECK,
Appellants,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

Counsel for Appellants:
MR. JOHN E. DOUGHERTY,
MR. G. F. CLIFFORD,
MR. THOMAS E. LEAHY,

Counsel for Appellee:
MR. B. J. HUSTING,

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

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1 May 4, 34.

1 DISTRICT COURT OF THE UNITED STATES

For the Eastern District of Wisconsin.

United States of America, }
Eastern District of Wisconsin. } ss.

At a stated term of the District Court of the United States of America, for the Eastern District of Wisconsin, begun and held at the City of Milwaukee, in said district, on the first Monday, (being the 7th day) of October, A. D. 1935, present the Honorable Ferdinand A. Geiger, District Judge, presiding:

Among other the following proceedings were had, to-wit:

The United States of America
vs.
Hyman Wainer, alias, *et al.*

CRIMINAL INDICTMENT.

Be it remembered that heretofore, to-wit: on the 4th day of May, 1934, came the Grand Jury and presented the following bill of indictment, to-wit:

May 4, 1934—INDICTMENT, filed as follows:

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA

For the Eastern District of Wisconsin.

At a regular term of the District Court of the United States of America, for the Eastern District of Wisconsin, to wit: at the regular January term thereof, in the year of our Lord One Thousand Nine Hundred and Thirty-four, held at the City of Milwaukee, in said Eastern District of Wisconsin.

Eastern District of Wisconsin, } ss.

The Grand Jurors of the United States of America, within and for the district aforesaid, duly empaneled and sworn, upon their oath present:

That Hyman Wainer, alias Heinie Wainer, alias Henry Wainer, Sam Wainer, Louis Wainer, Pete Bondie, alias Pete Blondie, alias Mr. Jackson, alias Dr. Leland C. Asay, alias Ed Gerson, August Becker, Earl Blink, Donald Blink, alias "Buck" Blink, Charles Christenson, alias Charles Christianson, Ervin Dorschner, alias Abe Dorschner, George Davis, alias "Shorty" Davis, Sid Freeman, Floyd Granger, Ed Lueke, Merle Ravey, Ed Rossey, alias Ed Rosey, alias Ed Rossi, Gus Rossey, alias Gus Rosey, alias Gus Rossi, Louis Sasse, Howard Siats, alias "Doc" Siats, Adolph Siebold, John Trambar, Alfred Tessen, alias Al Taustin, and Theodore Wallmer, alias Ted Wallmer, hereinafter referred to as defendants, at New London, in Counties of Waupaca and
3 Outagamie, within the State and Eastern District of Wisconsin, and within the jurisdiction of this court, did, on or about the first day of July, in the year nineteen hundred and twenty-five, the exact time and place being to the Grand Jurors unknown, and at all times thereafter up to and including the date of the filing of this indictment, knowingly, unlawfully, wilfully and feloniously conspire, combine, confederate and agree together and with each other, and with divers other persons whose names are to the Grand Jurors unknown, to commit an offense and offenses against the United States, to wit: to unlawfully, wilfully and knowingly violate Sections 281, 282, 290, 193, 284, 306, 307, 328 and 1181 of Title 26 of the United States Code of Laws, and to defraud the United

States; by having in their possession and custody and under their control distilling apparatus set up and not registered according to law; by engaging in the business of a distiller and the business of a rectifier without giving to the Collector of Internal Revenue of the district wherein such distilling and rectifying business was to be carried on the written notice required by law; by setting up stills, boilers and other vessels to be used for the purpose of distilling without first obtaining from the Collector of Internal Revenue of the district in which such stills, boilers and other vessels were intended to be used the permit required by law; by carrying on the business of a rectifier, the business of a wholesale liquor dealer, and the business of a wholesale dealer in malt liquors without paying the special tax and taxes as required by law; by carrying on the business of a distiller without giving the bond required by law; by engaging in and carrying on the business of a distiller with the intent, on the part of the said defendants, to defraud the United States of the tax on the spirits to be distilled by the said defendants; by making and fermenting mash, fit for distillation and for the production of spirits and alcohol, in buildings and on premises other than a
4 distillery duly authorized according to law; by engaging in and carrying on the business of a rectifier with intent to defraud the United States of the tax on the spirits rectified, or to be rectified by them, the said defendants, and with intent to aid, abet and assist each other in defrauding the United States of the tax on distilled spirits, and by receiving and rectifying distilled spirits which had been and distilled spirits which were to be removed from a distillery to a place and places other than the distillery warehouse provided by law; and by removing and aiding and abetting in the removal of distilled spirits on which the tax had not been paid to a place and places other than the bonded warehouse or warehouses provided by law, and by concealing and aiding in the concealment of distilled spirits so removed.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further charge and present that at the hereinafter stated times, in pursuance of, in execution of, in furtherance of, and for the purpose of carrying out, and to effect the object, design and purpose of said unlawful conspiracy, combination, confederation and agreement, as aforesaid, the hereinafter named defendants and conspirators did the following overt acts in the Eastern District of Wisconsin:

Overt Acts.

I.

That on or about the 25th day of May, 1921, at Waupaca County, State of Wisconsin, the defendant Hyman Wainer alias Heinie Wainer, alias Henry Wainer, rented from Mrs. Kent and Elmer Kent a barn on a farm in Mukwa Township, Waupac County, Wisconsin.

II.

That on or about the 1st day of May, 1930, the defendants Hyman Wainer, alias Heinie Wainer, alias Henry Wainer, Sam Wainer, Louis Wainer, and Sid Freeman did set up
5 on the farm of Mrs. Emma Kent and Elmer Kent, in Waupaca County, Wisconsin, stills, boilers and other vessels to be used for the purpose of distilling, without first having obtained from the Collector of Internal Revenue of the district in which stills, boilers and other vessels were intended to be used, the permit required by law.

III.

That on or about the 1st day of June, 1930, at Waupaca County, State of Wisconsin, the defendant Louis Wainer paid to one Elmer Kent the sum of Seventy Dollars ($70.00) for the rental of a barn belonging to the said Elmer Kent and Mrs. Emma Kent, and situated in Mukwa Township, Waupaca County, Wisconsin.

IV.

That on or about the 1st day of July, 1930, at Mukwa Township, Waupaca County, Wisconsin, and on a farm belonging to Mrs. Emma Kent and Elmer Kent, the defendants Hyman Wainer, alias Heinie Wainer, alias Henry Wainer, Sam Wainer and Louis Wainer, and others to the Grand Jurors unknown, did carry on the business of a distiller without having given bond as required by law.

V.

That on or about the 15th day of July, 1932, at Fond du Lac, Fond du Lac County, Wisconsin, the defendants Hyman Wainer, alias Heinie Wainer, alias Henry Wainer, and Ed Lueke negotiated with one Louis J. Supple for the purchase of two lots in Bannister and Lewis Subdivision of the City of Fond du Lac, Wisconsin.

VI.

That on or about the 1st day of August, 1932, the defendants Hyman Wainer, alias Heinie Wainer, alias Henry Wainer, and Ed Lueke caused to be erected in the Ban-
6 nister and Lewis Subdivision, City of Fond du Lac, Wisconsin, a building designed and to be used as a distillery.

VII.

That on or about the 13th day of January, 1933, the defendants Sam Wainer, Earl Blink and Adolph Siebold did transport over the streets and highways of Winnebago County, Wisconsin, a truck load of distilled spirits upon which distilled spirits the tax provided by law had not been paid.

VIII.

That on or about the 1st day of June, 1931, the defendants Hyman Wainer, alias Heinie Wainer, alias Henry Wainer, Sam Wainer, Louis Wainer, Pete Bondie, alias Pete Blondie, alias Mr. Jackson, alias Dr. Leland C. Asay, alias Ed Gerson, August Becker, Earl Blink, Donald Blink, alias "Buck" Blink, Charles Christenson, alias Charles Christianson, Ervin Dorschner, alias Abe Dorschner, George Davis, alias "Shorty" Davis, Sid Freeman, Floyd Granger, Ed Lueke, Merle Ravey, Ed Rossey, alias Ed Rosey, alias Ed Rossi, Gus Rossey alias Gus Rosey, alias Gus Rossi, Louis Sasse, Howard Siats, alias "Doc" Siats, Adolph Siebold, John Trambar, Alfred Tessen, alias Al Taustin and Theodore Wallmer, alias Ted Wallmer, at the City of New London, in the Counties of Waupaca and Outagamie, Wisconsin, did carry on the business of a wholesale liquor dealer and the business of a wholesale dealer in malt liquors without having paid the special tax and taxes as required by the laws of the United States.

IX.

That on or about the 4th day of April, 1934, at the City of New London, in the Counties of Waupaca and Outagamie, Wisconsin, the defendant Louis Wainer did possess equipment intended for use and used for the rectification of
7 distilled spirits.

All contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Second Count.

And the Grand Jurors aforesaid, upon their oath aforesaid, further present:

That on or about the first day of March, in the year nineteen hundred and thirty-three, at the City of New London, in the Counties of Waupaca and Outagamie, Wisconsin, in the Eastern District of Wisconsin and within the Internal Revenue District of Wisconsin and within the jurisdiction of this court,

Hyman Wainer, alias Heinie Wainer, alias Henry Wainer,
Sam Wainer,
Louis Wainer,
Pete Bondie, alias Pete Blondie, alias Mr. Jackson, alias Dr. Leland C. Asay, alias Ed Gerson,
August Becker,
Earl Blink,
Donald Blink, alias "Buck" Blink,
Charles Christenson, alias Charles Christianson,
Ervin Dorschner, alias Abe Dorschner,
George Davis, alias "Shorty" Davis,
Sid Freeman,
Floyd Granger,
Ed Lueke,
Merle Ravey,
Ed Rossey, alias Ed Rosey, alias Ed Rossi,
Gus Rossey, alias Gus Rosey, alias Gus Rossi,
Louis Sasse,
Howard Siats, alias "Doc" Siats,
Adolph Siebold,
John Trambar,
Alfred Tessen, alias Al Taustin, and
Theodore Wallmer, alias Ted Wallmer,

the identical persons named in the first count of this indictment, did then and there wilfully, unlawfully and feloniously engage in carrying on the business of a wholesale liquor dealer without having paid the special tax as required
8 by law, within the intent and meaning of the Internal Revenue Laws of the United States of America; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Third Count.

And the Grand Jurors aforesaid, upon their oath aforesaid, further present:

That on or about the twenty-sixth day of April, in the year nineteen hundred and thirty-three, at Waupaca County, Wisconsin, in the Eastern District of Wisconsin and within the Internal Revenue District of Wisconsin and within the jurisdiction of this court, on a farm about four miles North of New London, Waupaca County, Wisconsin,

Hyman Wainer, alias Heinie Wainer, alias Henry Wainer,
Sam Wainer,
Louis Wainer,
Pete Bondie, alias Pete Blondie, alias Mr. Jackson, alias Dr. Leland C. Asay, alias Ed Gerson,
August Becker,
Earl Blink,
Donald Blink, alias "Buck" Blink,
Charles Christenson, alias Charles Christianson,
Ervin Dorschner, alias Abe Dorschner,
George Davis, alias "Shorty" Davis,
Sid Freeman,
Floyd Granger,
Ed Lueke,
Merle Ravey,
Ed Rossey, alias Ed Rosey, alias Ed Rossi,
Gus Rossey, alias Gus Rosey, alias Gus Rossi,
Louis Sasse,
Howard Siats, alias "Doc" Siats,
Adolph Siebold,
John Trambar,
Alfred Tessen, alias Al Taustin, and
Theodore Wallmer, alias Ted Wallmer,

the identical persons named in the first count of this indict-

ment, did conceal and aid in the concealment of distilled spirits, to wit: alcohol, the exact quantity of said alcohol
9 being to the Grand Jurors unknown, and on which said distilled spirits the tax had not been paid, which said spirits had been removed to a place other than the distillery warehouse provided by law; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Fourth Count.

And the Grand Jurors aforesaid, upon their oath aforesaid, further present:

That on or about the thirteenth day of January, in the year nineteen hundred and thirty-three, at Winnebago County, Wisconsin, in the Eastern District of Wisconsin and within the Internal Revenue District of Wisconsin and within the jurisdiction of this court,

Hyman Wainer, alias Heinie Wainer, alias Henry Wainer,
Sam Wainer,
Louis Wainer,
Pete Bondie, alias Pete Blondie, alias Mr. Jackson, alias Dr. Leland C. Asay, alias Ed Gerson,
August Becker,
Earl Blink,
Donald Blink, alias "Buck" Blink,
Charles Christenson, alias Charles Christianson,
Ervin Dorschner, alias Abe Dorschner,
George Davis, alias "Shorty" Davis,
Sid Freeman,
Floyd Granger,
Ed Lueke,
Merle Ravey,
Ed Rossey, alias Ed Rosey, alias Ed Rossi,
Gus Rossey, alias Gus Rosey, alias Gus Rossi,
Louis Sasse,
Howard Siats, alias "Doc" Siats,
Adolph Siebold,
John Trambar,
Alfred Tessen, alias Al Taustin, and
Theodore Wallmer, alias Ted Wallmer,

the identical persons named in the first count of this indictment, did remove and were concerned in the removal of, by

means of a GMC truck with trailer, to a place and from a
10 place to the Grand Jurors unknown, certain goods and commodities, to wit: 1650 gallons of alcohol, upon and in respect whereof a tax was imposed by law, the said defendants then and there intending to defraud the United States of such tax and all of said tax; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

(Signed) E. J. KOELZER
Assistant United States Attorney

Endorsed: Filed May 4, 1934 B. H. Westfahl, Clerk.

11 (Endorsed): Form No. 235. U. S. District Court. East. Dist. of Wisconsin The United States of America vs. Hyman Wainer, alias Heinie Wainer, alias Henry Wainer, Sam Wainer, Louis Wainer, Pete Blondie, alias Mr. Jackson, alias Dr. Leland C. Asay, alias Ed Gerson, August Becker, Earl Blink, Donald Blink, alias "Buck" Blink, Charles Christenson, alias Charles Christianson, Ervin Dorschner, alias Abe Dorschner, George Davis, alias "Shorty" Davis, Sid Freeman, Floyd Granger Ed Lueke, Merle Ravey, Ed Rossey, alias Ed Rosey, alias Ed Rossi, Gus Rossey, alias Gus Rosey, alias Gus Rossi, Louis Sasse, Howard Siats, alias "Doc" Siats, Adolph Siebold, John Trambar, Alfred Tessen, alias Al Taustin and Theodore Wallmer alias Ted Wallmer. Indictment Viol. Sec. 88, T. 18, in re Secs. 281, 282, 290, 193, 284, 306, 307, 328, 1181 of Title 26 U. S. Code & Sec. 193, 404, & 1181, Title 26, U. S. Code of Laws. (Signed) Elsmere J. Koelzer A True Bill Asst. U. S. Attorney (Signed) Charles L. Rathsack Foreman. Filed May 4, 1934 B. H. Westfahl

12 Arraignment and plea of defendants, filed as follows: Ent 1

UNITED STATES DISTRICT COURT

* * (Caption) * *

December 2, A. D. 1935.

Before the Honorable F. A. Geiger, Judge.

This day came the Assistant District Attorney, Mr. E. J. Koelzer and the defendants Hyman Wainer, alias; Louis Wainer; Donald Blink, alias; Charles Christenson, alias; Er-

vin Dorschner, alias; George Davis, alias; Ed Lueke, alias; Merle Ravey, Ed Rosey, alias; Louis Sasse; Adolph Siebold; John Trambar; Alfred Tessen, alias and Theodore Wallmer, alias with their counsels, Mr. Thos. Leahy and Mr. G. F. Clifford, and the defendants August Becker and Floyd Granger in their own proper persons. And the defendants Hyman Wainer, alias; George Davis, alias; and Theodore Wallmer alias being arraigned each tenders a special plea in bar as to the first count of the Indictment and plea of not guilty as to the second, third and fourth counts of the Indictment. And the special plea in bar of the defendants coming on to be heard on consideration thereof,

It is ordered by the Court that said special plea in bar be and the same hereby is denied.

13 Whereupon the said defendants Hyman Wainer, alias; George Davis, alias; and Theodore Wallmer, alias each pleads not guilty as to the first count of the Indictment. And the defendants August Becker and Floyd Granger being arraigned, each pleads guilty. And the defendants Louis Wainer; Donald Blink, alias; Charles Christenson, alias; Ervin Dorschner, alias; Ed Lueke; Merle Ravey; Ed Rossey, alias; Louis Sasse; Adolph Siebold; John Trambar and Alfred Tessen, alias being arraigned each pleads not guilty. And the defendants Hyman Wainer, alias; Louis Wainer; Donald Blink, alias; Charles Christenson, alias; Ervin Dorschner alias; George Davis, alias; Ed Lueke; Merle Ravey; Ed Rossey, alias; Louis Sasse; Adolph Siebold; John Trambar, Alfred Tessen, alias and Theodore Wallmer, alias move for a bill of particulars, on consideration thereof,

It is ordered by the Court that said motion be and the same hereby is denied. To which ruling the defendants then and there duly excepted which exception was allowed by the Court.

And the issue herein came on to be tried, as to the defendants Hyman Wainer, alias; Louis Wainer; Donald Blink, alias; Charles Christenson, alias; Ervin Dorschner, alias; George Davis, alias; Ed Lueke; Merle Ravey; Ed Rossey, alias; Louis Sasse; Adolph Siebold; John Trambar; Alfred Tessen, alias; and Theodore Wallmer, alias. Whereupon a Jury was called to try the same who came to-wit: J. P. Wolf, Peter J. Reiter, Adolph Roska, Fred H. Oberwetter, Ed A. Daberkow, George Weiler, Harry Ellsworth, Fay Freis, Henry Schober, Clarence M. Pierner, Aug. F. Auer, Henry A. Brahm, twelve free, honest and lawful men of the District

who were severally sworn and empanelled. And the trial of the issue not being concluded, same was adjourned until 9:30 A. M. tomorrow.

14 December 2, 1935—Special Plea in Bar, filed as follows:

IN THE DISTRICT COURT OF THE UNITED STATES
* * (Caption) * *

SPECIAL PLEA

Now comes the defendants, Heinie Wainer, Ted Walmer and George Davis, and by their attorney, G. F. Clifford, say that the United States ought not to prosecute further on the first count of the indictment on file herein in respect to the offense set forth therein for the following reasons:

1. For the reason that heretofore they were prosecuted for the same acts at the same place involving substantially the same time under an indictment which was returned as they are informed and believe in May, 1932, in the United States District Court for the Eastern District of Wisconsin.

15 2. That a copy of said indictment is hereto attached, marked Exhibit "A" and made a part of this special plea.

3. That thereafter, to wit: on the 6th day of December, 1932 the said defendants, Heinie Wainer, George Davis and Ted Walmer, pleaded guilty.

4. That the said Ted Walmer was referred to in said indictment as Fred Walmer and as Ted Doe, but that the indictment was amended to read Ted Walmer.

5. That the following is a correct transcript of the proceedings had and the pleas entered:

"Dec. 6, 1932. Defts. Heinie Wainer, Sam Wainer, Geo. Davis and Fred Walmer in Court with Atty. Waugh, arraigned and each pleaded guilty.

"Dec. 6, 1932. Deft., Heinie Wainer, sentenced to pay a fine of $2000.00, and in default of payment thereof to be committed to the custody of the Atty. Gen. to be by him confined in a jail until fine is paid or he is otherwise discharged according to law. $500.00 to be paid now, and a stay of 60 days granted in which to pay the balance. Bond continued.

"Dec. 6, 1932, Deft., Sam Wainer, sentenced to pay a fine

of $250.00 and in default of payment thereof to be committed to the custody of the Atty. Gen. to be by him confined in a jail until fine is paid or he is otherwise discharged according to law. Stay granted for thirty days. Bond continued.

"Dec. 6, 1932. Ordered that indictment be amended from Ted Doe to Ted Walmer alias Fred Walmer, and from Shorty Roe to George Davis."

6. That the fines of Heinie Wainer in the sum of $2000.00 was paid and that the fines of George Davis and Ted Walmer were also paid and that said proceedings amount to placing the defendants twice in jeopardy for substantially the same offense.

7. That the United States is barred from a further prosecution of the defendants for all acts involved in the same transaction to which they have been prosecuted and that the present indictment substantially covers the same acts.

TED WALMER
HEINIE WAINER
GEORGE DAVIS
G. F. CLIFFORD,
Attorney.

16 State of Wisconsin } ss.
Milwaukee County }

FRED WALMER, being first duly sworn, on oath says that he has read the foregoing plea in bar; that he makes this affidavit in behalf of himself and his co-defendants; that he has read the foregoing special plea and that the facts set up therein are true except the matters stated on information and belief, and those he believes to be true.

(Signed) FRED WALMER

Subscribed and sworn to before me this 2nd day of December, 1935.

(Sgd.) MARIE B. KLEIN
(Seal) *Notary Public, Milwaukee County, Wis.*

17 EXHIBIT "A".

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA
For the Western District of Wisconsin.

At a regular term of the District Court of the United States of America for the Western District of Wisconsin, to-wit: The Madison, December, 1931 term thereof, held at the city of Madison, in the county of Dane, within the state and Western District of Wisconsin, in the year of our Lord one thousand nine hundred and thirty-two.

The grand jurors of the United States of America, duly impaneled, sworn and charged at the term aforesaid, of the court aforesaid, on their oaths present; That Ralph West alias Carl West alias Karl West alias Mack West alias Ralph McKinley West alias R. M. West, Ada West alias Bea West alias Bea Bankes, Don Reid, Ralph Lyons, Fred Kvalshaw, Albert J. Tusa alias Al Tusa alias C. H. Clark alias Al Roberts, Angelo Guardalabene, Marion Jezo, Peter Pishettlo alias Peter Fisher, Joe Vallone, Sam Holzman, Jack Barber, Jack Phillips and Joe Pessin, late of Milwaukee, in the county of Milwaukee, within the Eastern District of Wisconsin; and Harry Feinberg, Max Feinberg, Leo Feinberg, John Richard Green, Dewey Armbruster and Leon P. Hatchell alias Chub Hatchell late of Baraboo, in the county of Sauk, within the Western District of Wisconsin; and Heinie Wainer, Sam Wainer, Ted Doe and Shorty Roe late of New London, in the County of Waupaca, within the Eastern District of Wisconsin; and George Williams late of Appleton, in the county of Outagamie, within the Eastern District of Wisconsin; and Lefty Sanders alias Lefty Saunders late of Austin, in the county of Mower, within the District of Minnesota; and John Ross late of Burlington, in the county of Racine, within the Eastern District of Wisconsin; and Herman Hans, Butch O'Neil and Cecil Grover late of La
18 Crosse, in the county of La Crosse, within the Western District of Wisconsin; and Herman Cicchini alias Bron late of Sheboygan, in the county of Sheboygan, within the Eastern District of Wisconsin; and Tony Domino late of Rockford, in the county of Winnebago, within the Northern District of Illinois; and Joe Kather late of Madison, in the county of Dane, within the Western District of Wisconsin; and Jim Jeyers alias Jim Myers late of St. Charles, in the

County of Winona, within the District of Minnesota; and L. E. Charman and Ed. Luke late of Fond du Lac, in the county of Fond du Lac, within the Eastern District of Wisconsin; and Nick Meyers alias Nick Myers late of Winona, in the County of Winona, within the District of Minnesota; and Albert Wanous, Stub Jacobson, Albert Cole alias Albert Kohl late of Blomming Prairie, in the county of Steele, within the District of Minnesota; and Paul Redfield late of Rapid City, in the county of Pennington, within the District of South Dakota; and Chris Melody late of Vesta, in the county of Redwood, within the District of Minnesota; and Ward
19 Smith Late of Howard, in the county of Miner, within the District of South Dakota; and Joe Dominic late of Racine, in the county of Racine, within the Eastern District of Wisconsin; and Joe Howard late of Cudahy, in the county of Milwaukee, within the Eastern District of Wisconsin, hereinafter referred to as defendants, in the county of Milwaukee, within the state and Eastern District of Wisconsin, and at Baraboo, in the county of Sauk, within the state and Western District of Wisconsin, and at St. Charles, in the county of Winona, within the state and District of Minnesota, and within the jurisdiction of this Honorable Court, did heretofore, to-wit; on or about the 1st day of August, 1928, and thereafter continuously from that date to on or about the 1st day of April, 1932, then and there knowingly, unlawfully, wilfully, and feloniously conspire, combine, confederate, arrange and agree together, and with each other, and with Earl Stevens, William Holmes, Matt Tuma, Alta Tums, Phil Smith, Lucile Smith, Oscar Olson, and Louis Tryon, and with divers other persons whose names are to your grand jurors unknown, all of which above named are hereinafter referred to as conspirators, to commit offenses and crimes against the United States, to-wit; to unlawfully, wilfully, and knowingly violate Section 3 of Title II of the Act of Congress known as the National Prohibition Act, in this:

That they, the said defendants and conspirators herein referred to, known and unknown, did then and there agree, as aforesaid, to unlawfully manufacture, sell, transport and possess large quantities of intoxicating liquors, all of which should contain more than one-half of one per cent of alcohol by volume, and which should be fit for use for beverage purposes, the manufacture, sale, transportation and possession of said intoxicating liquors, as aforesaid, being then and

there prohibited and unlawful, and in violation of the Act of Congress above mentioned.

20 And the grand jurors, aforesaid, upon their oaths aforesaid, do further charge and present that at the hereinafter stated times, in pursuance of, in execution of, in furtherance of, and for the purpose of carrying out, and to effect the object, design and purpose of said unlawful conspiracy, combination, confederation and agreement, as aforesaid, the hereinafter named defendants and conspirators did the following overt acts in the Western District of Wisconsin;

Overt Acts.

I.

That on or about the 1st day of August, 1928, and continuously thereafter until on or about the 15th day of January, 1932, at Baraboo, in the County of Sauk, state and Western District of Wisconsin, the defendants, Harry Feinberg, Leo Feinberg and Max Feinberg did unlawfully sell 440 gallons of alcohol each week to the defendant Paul Redfield and caused said alcohol to be transported from Baraboo, in the county of Sauk, State and Western District of Wisconsin, to Rapid City, in the state of South Dakota, all in violation of the National Prohibition Act.

II.

That on or about the 1st day of October, 1931, at Baraboo, in the county of Sauk, state and Western District of Wisconsin, the defendant Harry Feinberg sold 850 gallons of alcohol, in violation of the National Prohibition Act.

III.

That on or about the 2nd day of October, 1931, at Baraboo, in the county of Sauk, state and Western District of Wisconsin, the defendant Harry Feinberg sold 800 gallons of alcohol, in violation of the National Prohibition Act.

21 IV.

That on or about the 4th day of October, 1931, at Baraboo, in the county of Sauk, state and Western District of Wis-

consin, the defendant Harry Feinberg sold 850 gallons of alcohol, in violation of the National Prohibition Act.

V.

That on or about the 1st day of October, 1931, at Baraboo, in the county of Sauk, state and Western District of Wisconsin, the defendant Max Feinberg sold 850 gallons of alcohol, in violation of the National Prohibition Act.

VI.

That on or about the 16th day of December, 1930, the defendant Cecil Grover, at La Crosse, in the county of La Crosse, state and Western District of Wisconsin, sold and transported 513 gallons of alcohol, in violation of the National Prohibition Act.

VII.

That on or about the 20th day of December, 1930, at La Crosse, in the county of La Crosse, state and Western District of Wisconsin, the defendant Cecil Grover sold and transported 584 gallons of alcohol, in violation of the National Prohibition Act.

VIII.

That on or about the 6th day of January, 1931, at La Crosse, in the county of La Crosse, state and Western District of Wisconsin, the defendant Cecil Grover sold and transported 456 gallons of alcohol, in violation of the National Prohibition Act.

IX.

That on or about the 5th day of April, 1931, at Madison, in the County of Dane, state and Western District of Wisconsin, the conspirator Phil Smith transported 38 gallons of alcohol, in violation of the National Prohibition Act.

22 X.

That on or about the 1st day of October, 1931, at Baraboo, in the county of Sauk, state and Western District of Wis-

consin, the conspirators Earl Stevens and William Holmes transported 850 gallons of alcohol, in violation of the National Prohibition Act.

XI.

That on or about the 2nd day of October, 1931, at Baraboo, in the county of Sauk, state and Western District of Wisconsin, the conspirators Earl Stevens and William Holmes transported 800 gallons of alcohol, in violation of the National Prohibition Act.

XII.

That on or about the 4th day of October, 1931, at Baraboo, in the county of Sauk, state and Western District of Wisconsin, the conspirators Earl Stevens and William Holmes transported 850 gallons of alcohol, in violation of the National Prohibition Act.

XIII.

That on or about the 1st day of October, 1931, at Baraboo, in the county of Sauk, state and Western District of Wisconsin, the defendant John Richard Green transported 850 gallons of alcohol, in violation of the National Prohibition Act.

XIV.

That on or about the 2nd day of October, 1931, at Baraboo, in the county of Sauk, state and Western District of Wisconsin, the defendant John Richard Green transported 800 gallons of alcohol, in violation of the National Prohibition Act.

XV.

That on or about the 4th day of October, 1931, at Baraboo, in the county of Sauk, state and Western District of Wisconsin, the defendant John Richard Green transported 850 gallons of alcohol, in violation of the National Prohibition Act.

XVI.

That on or about the 10th day of October, 1931, at
23 Sparta, in the county of Monroe, state and Western District of Wisconsin, the conspirators Earl Stevens and

William Holmes transported 900 gallons of alcohol, in violation of the National Prohibition Act.

XVII.

That on or about the 19th day of October, 1931, at Sparta, in the county of Monroe, state and Western District of Wisconsin, the conspirators Earl Stevens and William Holmes transported 900 gallons of alcohol, in violation of the National Prohibition Act.

XVIII.

That on or about the 21st day of October, 1931, at Sparta, in the county of Monroe, state and Western District of Wisconsin, the conspirators Earl Stevens and William Holmes transported 900 gallons of alcohol, in violation of the National Prohibition Act.

XIX.

That on or about the 24th day of October, 1931, at Sparta, in the county of Monroe, state and Western District of Wisconsin, the conspirators Earl Stevens and William Holmes transported 900 gallons of alcohol, in violation of the National Prohibition Act.

XX.

That on or about the 15th day of October, 1931, the defendant Ralph Lyons transported from Milwaukee, Wisconsin through the Western District of Wisconsin, and to St. Charles, in the District of Minnesota 5,000 one gallon tin cans, which were to be used as containers for alcohol manufactured in violation of the National Prohibition Act.

XXI.

That from on or about the 1st day of August, 1928, to on or about the 1st day of October, 1931, the conspirator Phil Smith did unlawfully transport from Milwaukee, Wisconsin through the Western District of Wisconsin, and into Madison, in the Western District of Wisconsin, 3,000 gallons of alcohol each month, in violation of the National Prohibition Act.

24 XXVIII.

That on or about the 10th day of March, 1932, at _ in the county of Sauk, state and Western District of Wisconsin, the defendant Harry Feinberg possessed 3,245 gallons of alcohol, in violation of the National Prohibition Act.

XXIX.

That on or about the 15th day of March, 1932, at Baraboo, in the county of Sauk, state and Western District of Wisconsin, the defendant Harry Feinberg sold 60 gallons of alcohol, in violation of the National Prohibition Act.

XXX.

That on or about the 28th day of March, 1932, at La Crosse, in the county of La Crosse, state and Western District of Wisconsin, the defendant Butch O'Neil transported 790 gallons of alcohol, in violation of the National Prohibition Act.

XXXI.

That on or about the 29th day of March, 1932, at Baraboo, in the county of Sauk, state and Western District of Wisconsin, the defendant Butch O'Neil transported 800 gallons of alcohol, in violation of the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

STANLEY R. RYAN
LYMAN F. POWELL, JR.
United States Attorney
Western District of Wisconsin.

Endorsed: "Filed Dec 2 1935 B. H. Westfahl, Clerk".

25 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption) * *

MOTION FOR BILL OF PARTICULARS.

Dec. 2, 1935

Filed as follows.

Now come the above named defendants by their attorneys, Thomas E. Leahy and G. F. Clifford, and move the court for an order requiring the Government to furnish the defendants, as promptly as possible, a written bill of particulars against the following matters alleged in the indictment herein. As to Count One—

1. When each and every one of the defendants became a party of the alleged conspiracy.

26 2. What act, the date and place of the last act of each of the defendants in connection with the conspiracy.

As to Count Two—

1. What part each of the defendants had in alleged operation of wholesale liquor deal business.

THOMAS E. LEAHY and
G. F. CLIFFORD,
Attorneys for Defendants.

27 State of Wisconsin }
Milwaukee County } ss.

THOMAS E. LEAHY, being first duly sworn on oath, says that he was but recently retained by some of the defendants, to wit, about the 30th day of November, 1935; that he did not have an opportunity of seeing the majority of the defendants that he represents until Tuesday, November 26th, and that he did not have an opportunity to confer with all of the deendants that he represents until December 1st, at about 7:00 o'clock P. M. That the alleged conspiracy covers a period, generally, of from 1925 to the return of the indictment, and that the first Overt Act is alleged in 1921, when several of the defendants were still in the grade schools and of the ages of eight or nine years.

That as far as he can discover, the situation relates to isolated transactions and to several smaller conspiracies, the

majority of which the Statute of Limitations would run against, and that it is necessary for him and G. F. Clifford, representing the other defendants, to know when it is claimed that the defendants became a party to the conspiracy and when it is claimed they were last connected with it, which information should result in expediting the trial and disposition of said action.

THOMAS E. LEAHY

Subscribed and sworn to before me this 2nd day of December, 1935.
(Seal)

MARIE B. KLEIN
Notary Public, Milwaukee County, Wisconsin

Endorsed: "Filed Dec 2, 1935 B. H. Westfahl Clerk".

28 December 3, 1935—Trial resumed: not concluded.

UNITED STATES DISTRICT COURT.
* * (Caption) * *

December 3, A. D. 1935.

Before the Honorable F. A. Geiger, Judge.

This day came the Assistant District Attorney, Mr. E. J. Koelzer and the defendants with their counsel and also the jurors of the jury. And the trial of the issue herein was resumed and not being concluded same was adjourned until 9:30 A. M. tomorrow.

29 December 4, 1935—Trial resumed: not concluded.

UNITED STATES DISTRICT COURT.
* * (Caption) * *

December 4, A. D. 1935.

Before the Honorable F. A. Geiger, Judge.

This day came the Assistant District Attorney, Mr. E. J. Koelzer and the defendants with their counsel, Mr. Thos. Leahy and Mr. G. F. Clifford and also the jurors of the jury.

And the trial of the issue herein was resumed. And at conclusion of the testimony of the prosecution the defendants Louis Wainer, Donald Blink, alias; Charles Christenson, alias; Ervin Dorschner, alias; George Davis, alias; Ed Lueke; Merle Ravey; Ed Rossey, alias; Louis Sasse; Adolph Siebold; John Trambar; Alfred Tessen, alias and Theodore Wallmer, alias; Move for dismissal of the second count of the Indictment, on consideration thereof,

It is ordered by the Court that said motion be and the same hereby is denied. To which ruling the defendants then and there duly excepted which exception was allowed by the Court. Thereupon the defendant Charles Christenson, alias, moves for dismissal of the Indictment, on consideration thereof,

It is ordered by the Court that said motion be and the same hereby is denied. To which ruling the defendants then and there duly excepted, which exception was allowed by the Court. And at conclusion of all the testimony, the defendants move for dismissal of the third count of the Indictment, on consideration thereof,

It is ordered by the Court that said motion be and the same hereby is denied. And the trial not being concluded, same was adjourned until 9:30 A. M. tomorrow.

30 Dec. 5, 1935—Defendants' requested instructions, filed as follows:

IN THE UNITED STATES DISTRICT COURT.
* * (Caption) * *

Now come the above named defendants by their attorneys, and request the court to instruct the jury as follows:

I.

If you should find that any one of the defendants allege to have been a party to the conspiracy, was a party, but that he abandoned all effort in the conspiracy and took no further part in it for a period of three years prior to the time of the return of the indictment herein, you should not find him guilty under the charge of conspiracy on file herein.

II.

Certain witnesses of the government have admitted their complicity in the crimes charged, and are known as accom-

plices. The testimony of such witnesses should be received with care and caution, and scrutinized carefully, and the defendants, or any one of them, should not be convicted unless the jury is satisfied that such evidence is true, and taken with all the evidence, establishes the guilt of the defendants without any reasonable doubt.

III.

The defendants, under Count 2 of the Indictment, are charged with carrying on the business of a wholesale dealer without having paid the special tax. If the defendants, or any one of them, were merely employed by one who did carry
31 on such business, as a servant or employe, and were not interested as owners, they cannot be found guilty of carrying on the business as wholesale liquor dealers, and you should find them not guilty under the charge set forth in Count 2.

Dated, this 3rd day of December, 1935.

THOMAS E. LEAHY and
G. F. CLIFFORD,
Attorneys for Defendants.

Endorsed: "Filed Dec 5 1935 B. H. Westfahl, Clerk".

32 December 5, 1935—Trial resumed: order deferring sentence. Ente 193

UNITED STATES DISTRICT COURT.

* * (Caption) * *

December 5, A. D. 1935.

Before the Honorable F. A. Geiger, Judge.

This day came the Assistant District Attorney, Mr. E. J. Koelzer and the defendants with their counsels, Mr. Thos. Leahy and Mr. G. F. Clifford and also the jurors of the jury. And the jurors of the jury being charged by the Court retired to their room in charge of a sworn officer to deliberate upon their verdict. And afterwards came into Court and on their oaths respectively do say that they find the defendants guilty in manner and form as charged in the Indictment.

And it is ordered that sentence of the defendants be deferred until Monday, December 9, 1935.

33 December 5, 1935—Verdict of Jury, filed as follows:

UNITED STATES DISTRICT COURT.
* * (Caption) * *

We the Jury duly sworn and empanelled to try the issue in the above entitled cause find the defendants guilty in manner and form as charged in the Indictment.

Foreman:
(Signed) JOHN P. WOLF

34 Dec. 7, 1935—Motion of Defendants for new trial, filed as follows:

IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption) * *

Now comes the defendants, Heinie Wainer, Louis Wainer, Earl Blink, George Davis, Ed Lueke, Merle Ravey, Ed Rossey, Louis Sasse, Adolph Siebold, John Trambar, Alfred Tessen, Theodore Walmer, Charles Christenson, Ervin Dorschner, by their attorneys, Thomas Leahy and G. F. Clifford and move the court to grant them a new trial in the above entitled cause for the following reasons:

1. That the court erred in refusing to instruct the jury in manner and form as requested by defendants' attorneys, a copy of which requests are hereto attached, marked Exhibit A and made a part of this motion, to which refusal the defendants excepted.

35 2. For the reason that the court erroneously instructed the jury as follows:

"If, on the other hand, you reach the conclusion that the proof here satisfies you, as I shall indicate to you that you should be satisfied, namely, to a moral certainty, that there was a conspiracy of the general nature described in the indictment, having the objective with respect to illicit stills and the illicit liquor business and the violation or the disregarding, rather, of the rather full regulations of the United States Government, which regulations, if not complied with, make those who fail to comply with them an offender."

to which defendants excepted.

3. For the reason that the court erred in permitting the

statement of Al Tessen to be introduced against the objection of the defendants.

4. For the reason that the court erred in instructing the jury, which statement was not made in pursuance of the conspiracy, for the purpose of the conspiracy and as a part of it.

5. For the reason that the court erred in admitting evidence against the defendants' objection to which exception was taken which questions, answers and exceptions are hereto attached, marked Exhibit "B" and made a part of this motion.

And in case said motion should be denied, defendants move the court in arrest of judgment that the indictment is defective in matter of substance, and that the whole thereof and each and every count does not state an offense against the United States.

THOMAS LEAHY and
G. F. CLIFFORD,
Attorneys for said Defendants.

36 EXHIBIT A.

IN THE UNITED STATES DISTRICT COURT.

Eastern District of Wisconsin.

United States of America,
Plaintiff.
vs.
Heinie Wainer, *et al.*,
Defendants.

Now come the above named defendants by their attorneys, and request the court to instruct the jury as follows:

I.

If you should find that any one of the defendants alleged to have been a party to the conspiracy, was a party, but that he abandoned all effort in the conspiracy and took no further part in it for a period of three years prior to the time of the return of the indictment herein, you should not find him guilty under the charge of conspiracy on file herein.

II.

Certain witnesses of the Government have admitted their complicity in the crimes charged, and are known as accomplices. The testimony of such witnesses should be received with care and caution, and scrutinized carefully, and the defendants, or any one of them, should not be convicted unless the jury is satisfied that such evidence is true, and taken with all the evidence, establishes the guilt of the defendants without any reasonable doubt.

III.

The defendants, under Count 2, of the indictment, are charged with carrying on the business of a wholesale dealer without having paid the special tax. If the defendants, or
37 any one of them, were merely employed by one who did carry on such business, as a servant or employee, and were not interested as owners, they cannot be found guilty of carrying on the business as wholesale liquor dealers, and you should find them not guilty under the charge set forth in Count 2.

Dated this 3rd day of December, 1935.

THOMAS E. LEAHY and
G. F. CLIFFORD,
Attorneys for Defendants.

38 EXHIBIT "B."

1. The admission of the record of Emma Kent and Elmer Kent *vs.* Henry and Louis Wainer, to which due exception was taken.

2. The further admission of the case of Blink *vs.* Henry Wainer and Louis Wainer, to which exception was taken for the reason that the whole record was not material.

3. The court erred in refusing to strike out the testimony of Elmer Granger, relating to statements made by Sam Wainer and Pete Bondie, with reference to the stealing of a still, to which exception was taken, to wit:

Q. Who came to you.

A. Pete did, and he asked me if I would go on a job with him. He said hijackers had stole a still from him and they

were going to steal it back. And I told him sure I would go and asked him the price, and he told me what he would pay me and I went with him. I loaded out the still and went home again. Pete got arrested and was taken to jail and Sam Wainer came to me and told me I had better get out of the country for a while, to get in the sticks, and he gave me eight dollars to leave with, and in the meantime, while I was up there I wrote home to my mother and told her I had to have some money for I was going to stay up there and I guess she talked with Sam and Sam gave her some money to send to me. Two or three different times she sent me money.

Mr. Clifford: I move to strike that out on the ground that as concerning these other defendants the transactions with Sam Wainer and Pete Bondie are immaterial until that act and those people are connected with the conspiracy.

The Court: The motion is denied.

Mr. Clifford: May I have an exception?

39 AFFIDAVIT.

Milwaukee, Wisconsin,
May 4, 1934.

State of Wisconsin, }
County of Milwaukee. } ss.

I, Alfred C. Tessen, on oath deposes and says:

I live at Fremont, Wisconsin, R. F. D. # 1; am 35 years old, and know that I am giving this statement to Federal Officers H. C. Beaudrie and H. A. Goddard. I understand my constitutional rights; they advised me of them. I went to work for Heinie Wainer; he employed me at New London, Wisconsin, in the cattle office, in September, 1930. I understood that my duties would consist of handling illicit liquors; he promised me $35.00 per week. My first job was to haul 500 gallons of alcohol (in one gallon cans) from New London, Wisconsin, to Galesburg, Illinois, to the home of Dave Wainer. Sam Wainer accompanied me on this trip. Dave Wainer drove a convoy auto. My next trip was a few days later. Sam Wainer and I again hauled a similar load to Galesburg, Illinois. We averaged two trips per week until February, 1931, at which time I started a saloon at Weyauwega, Wisconsin, which I operated until April, 1931, buying my liquors and

beer from Heinie Wainer and his men, some of whom were Merle Ravey, Ethelmer Fuhrman, Ed Rossey, Joe Hoffman, all of whom made deliveries to me.

In April, 1931, I went back to work for Heinie Wainer at $30.00 per week. My duties then consisted of making beer on the Herman Bauer Farm, near New London, Wisconsin, on the Stevensville Road. I delivered most of this beer (in kegs and cases), sometimes aided by Merle Ravey, Kenneth Whitney, George Zitsky, Ed. Rossey. During the summer of 1931, Merle Ravey was making beer at the "Klott House," located two doors west from Heinie Wainer's home on Pine Street, New London, Wisconsin.

In February, 1932, I was arrested by Federal Officers C. R. Olson, Baseman and Merkel while delivering some of the aforesaid beer to the Pinehurst Roadhouse, near Shawano, Wisconsin. Frank "Dutch" Miller was helping me to deliver it, but he was not arrested. We were then making beer at the George Zitsky residence, located on the County Line Road on the edge of New London, Wisconsin. I continued to make beer, both at the Bauer Farm and at a cottage on a farm (10 acres) near Sugar Bush, Wisconsin. We made on an average of 75 to 100 half barrels and 150 cases (24 bottles each) per week. When not busy making beer, 1931, 1932, I helped can alcohol at the brick house located just east of Ted Wallmer's Tavern (of New London, Wisconsin). I lived there from December 27 or 28, 1931, until mid-summer of 1932. Federal Officers raided the barn on this place about the middle of June, 1932. They were accompanied by Chief of Police Harry Macklin. They seized one drum (53-gallons) of alcohol. Heinie Wainer had control and possession of the barn at that time. I rented the house and garage from him. During 1931, 1932, 1933 and 1930 we were continually bothered by hi-jackers, stealing our liquors and beer.

In July, 1932, I moved to Spring Road, New London, Wisconsin, and thence to East Hancock Street, New London, Wisconsin, in September, 1932, where I stored the entire product of the illicit brewery and also at time quantities of whiskey for Heinie Wainer. Ed Rossey and Frank "Dutch" Miller, "Stub" Wyman, Johnny Traubar, George Davis, Abe Dorschner, Louis Sasso, Sam Wainer have helped me either in beer or the liquor handling.

I have also worked in illicit liquor with Earl Blink, Donald Blink, August Becker, Pete Bondie, Charles Christenson, Glen Froelich, Kenneth Whitney and Harland Ravey. Heinie

Wainer and Louis Wainer acted as bosses of these activities.

In April, 1933, I drove Wainer's Ford panel truck, which bore a sign, "Triangle Produce Co.", from Fond du Lac, Wisconsin, near airport, to New London, Wisconsin, with 1,000 gallons of alcohol, (one-gallon cans) each load. I made two trips. I stored this alcohol in Earl Blink's Garage at his
41 home, three blocks from New High School Building in New London, Wisconsin.

About April 27, 1933, at Gus Rossey's home, on Mrs. Louis Wainer's Farm, located about three miles north of New London, Wisconsin, we (myself, and Earl Blink, Merle Ravey) were told by Pete Bondie to hide in the house and watch for hi-jackers. Soon came "Buck" Blink, Johnny Traubar (just after hi-jackers entered the basement). We rushed the hi-jackers, but only succeeded in catching George McElroy, the truck driver. I struck this truck driver with my fist and he was taken into the house, where Sam Wainer and Pete Bondie helped guard him. We then went into the basement and took out the alcohol, over 700 gallons in cans, and seven or eight drums (55 gallons) loaded this alcohol to the brick house just east of Ted Wallmer's Tavern, where we stored it. In the winter of 1930, I saw about 8,000 gallons of alcohol stored at Ethelmer Fuhrman's home in the Rossam House in southern part of New London, Wisconsin. I helped haul this alcohol from there and I know it belonged to Heinie Wainer, as he told me to go and help haul it. I was helped by E. Fuhrman, Merle Ravey, Earl Blink, August Beck, Abe Dorschner, Louis Sasse, Eddie Pealling, John Trauber, George Davis, "Fat" Blink.

In November, 1932, I helped one Elmer —— Tear down a still N. E. of Clintonville, Wisconsin, (over ten mile N. S.) and about seven or eight miles from the lime kiln. I was sent to do this work by Heinie Wainer. While we were tearing it down, Elmer said, "This still is hot and we must get it out of here in a hurry."

When the Wainers received word that the Government Officers had seized their cutting plant at Fond du Lac, Wisconsin, in April, 1933, Earl Blink came to my home at 3:00 A. M. and awoke me to help move liquors and alcohol from the Klott House and from Earl Blink's home. I only helped load the trucks. Louis Wainer, "Stub" Wyman, Kenneth Whitney and Leo Nichols went on the trucks.

In May, 1933, I was sent by Heinie Wainer to Oconto,
42 Wisconsin. He said he would give me a job in his brewery there. Frank Miller had been taken there about six weeks before me by Ed Rossey. We were getting the place ready to make beer. Heinie said that Johnnie Strange was to be our boss. I worked until July 4, 1933, when Mr. S. Liengel came and told us to leave as they could not get a permit as long as Miller and I were employed there. Vilas Rundhammer was bookkeeper for Heinie Wainer at the time and paid me $7.50 per week for seven weeks, awaiting to see if I could go back to work at Oconto Brewery.

In September, 1933, I started to work in Wainer whiskey cutting plant in the brick house east of Ted Wallmer's Tavern; also at the "cottage" just north, about 1½ miles, labeling and filling bottles, corking and capping them. Heinie and Louis Wainer directed the work and paid me $15.00 per week. We averaged, in these two cutting plants about 100 cases of whiskey per day. I quit working for Wainers about November 15, 1933, and just afterwards I stole 270 gallons of whiskey from Heinie Wainer. I took it from the "cottage" located about three miles north of New London, Wisconsin.

The day after I stole it, Vidas Rundhammer came to my house and demanded that I return the whiskey. I refused, he left. Soon afterwards, Heinie Wainer met me at his office (in the old Ramm Garage—Ford) and gave me $100.00 for returning the whiskey.

At one time when I was helping can alcohol the Wainers were handling 2,000 to 3,000 gallons per day.

From November 13, 1933, until Christmas, 1933, I often saw trucks bearing Wainer employees go in and out of the cutting plant at the brick building just east of Ted Wallmer's Tavern.

Subscribed and sworn to before me this Fourth day of May, A. D. 1934.

H. A. GODDARD,
Investigator.

Witness:
HOWARD C. BEAUDRIE,
Investigator.

Endorsed: Filed Dec. 7, 1935. B. H. Westfahl, Clerk.

43 And afterwards, to-wit: on the 54th day of said Term, to-wit: on the 9th day of December, A. D. 1935, the following proceedings were had, to-wit: Enter 193

UNITED STATES DISTRICT COURT.

* * (Caption) * *

December 9, A. D. 1935.

Before the Honorable F. A. Geiger, Judge.

This day came the Assistant District Attorney, Mr. E. J. Koelzer and the defendants Hyman Wainer, alias Heinie Wainer, alias Henry Wainer; Louis Wainer; Donald Blink, alias "Buck" Blink; Charles Christenson, alias Charles Christianson; Ervin Dorschner, alias Abe Dorschner; George Davis, alias "Shorty" Davis; Ed Lueke; Merle Ravey; Ed Rossey, alias Ed Rosey, alias Ed Rossi; Louis Sasse; Adolph Siebold; John Trambar; Alfred Tessen, alias Al Taustin and Theodore Wallmer, alias Ted Wallmer, with their counsels, Mr. G. F. Clifford and Mr. Thos. Leahy; and the defendants August Becker and Floyd Granger in their own proper persons. And the motion of the defendants Hyman Wainer, alias Heinie Wainer, alias Henry Wainer; Louis Wainer; Donald Blink, alias "Buck" Blink; Charles Christenson, alias Charles Christianson; Ervin Dorschner, alias Abe Dorschner; George Davis, alias "Shorty" Davis; Ed Lueke; Merle Ravey; Ed Rossey, alias Ed Rosey, alias Ed Rossi; Louis Sasse; Adolph Siebold; John Trambar; Alfred Tessen, alias Al Taustin and Theodore Wallmer, alias Ted Wallmer for a new trial came on to be heard, was argued and submitted,

44 on consideration thereof,

It Is Ordered by the Court that the motion of said defendants for a new trial be and the same hereby is denied.

And the District Attorney moves for sentence of the defendants Hyman Wainer, alias Heinie Wainer, alias Henry Wainer; Louis Wainer; Donald Blink, alias "Buck" Blink; Charles Christenson, alias Charles Christianson; Ervin Dorschner, alias Abe Dorschner; George Davis, alias "Shorty" Davis; Ed Lueke; Merle Ravey, Ed Rossey, alias Ed Rosey, alias Ed Rossi; Louis Sasse; Adolph Siebold; John Trambar; Alfred Tessen, alias Al Taustin and Theodore Wallmer, alias Ted Wallmer upon the verdict of guilty and for sentence of the

defendants August Becker and Floyd Granger on their pleas of guilty heretofore entered.

Whereupon It Is Ordered and Adjudged by the Court that the said defendant Hyman Wainer, alias Heinie Wainer, alias Henry Wainer for the offense charged in the first count of the Indictment be imprisoned in a United States Penitentiary for the term of two years and that he pay a fine of $10,000.00 to the United States and stand committed until said fine is paid. And for each of the offenses charged in the second and third counts of the Indictment that he be imprisoned in a United States Penitentiary for the term of two years and that he pay a fine of $1,000.00 to the United States and stand committed until said fine is paid. And for the offense charged in the fourth count of the Indictment that he pay a fine of $100.00 to the United States and stand committed until said fine is paid.

Further Ordered that said sentence and judgment shall be cumulative and not concurrent, and that the sentence on the second and third counts of the Indictment be severally served consecutively following sentence imposed on the first count of the Indictment, making a total term of imprisonment of six years and a total fine of $12,100.00

Further Ordered that execution of sentence be stayed for five days.

And It Is Ordered and Adjudged by the Court that the said defendant Louis Wainer for the offense charged in the first count of the Indictment be imprisoned in a United States
45 Penitentiary for the term of two years and that he pay a fine of $10,000.00 to the United States and stand committed until said fine is paid. And for each of the offenses charged in the second and third counts of the Indictment that he be imprisoned in a United States Penitentiary for the term of two years and that he pay a fine of $1,000.00 to the United States and stand committed until said fine is paid. And for the offense charged in the fourth count of the Indictment that he pay a fine of $100.00 to the United States and stand committed until said fine is paid.

Further Ordered that said sentence and judgment shall be cumulative and not concurrent, and that the sentence on the second and third counts of the Indictment be severally served consecutively following sentence imposed on the first count of the Indictment, making a total term of imprisonment of six years and a total fine of $12,100.00.

Further Ordered that execution of sentence be stayed for five days.

And It Is Ordered and Adjudged by the Court that the said defendant Donald Blink, alias "Buck" Blink be imprisoned in the House of Correction of Milwaukee County, Wis., for the term of three months and that he pay a fine of $100.00 to the United States and stand committed until said fine is paid.

Further Ordered that execution of sentence be stayed for ten days.

And It Is Ordered and Adjudged by the Court that the said defendant Charles Christenson, alias Charles Christianson pay a fine of $100.00 to the United States and in default thereof that he be committed to the House of Correction of Milwaukee County, Wis., and stand committed until said fine is paid.

Further Ordered that execution of sentence be stayed for five days.

And It Is Ordered and Adjudged by the Court that the said defendant Ervin Dorschner, alias Abe Dorschner pay a fine of $100.00 to the United States and in default thereof that he be committed to the House of Correction of Milwaukee County, Wis., and stand committed until said fine is paid.

46 Further Ordered that execution of sentence be stayed for five days.

And It Is Ordered and Adjudged by the Court that the said defendant George Davis, alias "Shorty" Davis be imprisoned in the House of Correction of Milwaukee County, Wis., for the term of three months and that he pay a fine of $100.00 to the United States and stand committed until said fine is paid.

Further Ordered that execution of sentence be stayed for five days.

And It Is Ordered and Adjudged by the Court that the said defendant Ed Lueke be imprisoned in the House of Correction of Milwaukee County, Wis., for the term of six months and that he pay a fine of $100.00 to the United States and stand committed until said fine is paid.

Further Ordered that execution of sentence be stayed for five days.

And It Is Ordered and Adjudged by the Court that the said defendant Merle Ravey pay a fine of $100.00 to the United States and in default thereof that he be committed to the House of Correction of Milwaukee County, Wis., and stand committed until said fine is paid.

Further Ordered that execution of sentence be stayed for five days.

And It Is Ordered and Adjudged by the Court that the said defendant Ed Rossey, alias Ed Rosey, alias Ed Rossi pay a fine of $100.00 to the United States and in default thereof that he be committed to the House of Correction of Milwaukee County, Wis., and stand committed until said fine is paid.

Further Ordered that execution of sentence be stayed for five days.

And It Is Ordered and Adjudged by the Court that the said defendant Louis Sasse pay a fine of $100.00 to the United States and in default thereof that he be committed to the House of Correction of Milwaukee County, Wis., and stand committed until said fine is paid.

Further Ordered that execution of sentence be stayed for five days.

47 And It Is Ordered And Adjudged by the Court that the said defendant Adolph Siebold pay a fine of $100.00 to the United States and in default thereof that he be committed to the House of Correction of Milwaukee County, Wis., and stand committed until said fine is paid.

Further Ordered that execution of sentence be stayed for five days.

And It Is Ordered And Adjudged by the Court that the said defendant John Trambar pay a fine of $100.00 to the United States and in default thereof that he be committed to the House of Correction of Milwaukee County, Wis., and stand committed until said fine is paid.

Further Ordered that execution of sentence be stayed for five days.

And It Is Ordered And Adjudged by the Court that the said defendant Theodore Wallmer, alias Ted Walmer pay a fine of $100.00 to the United States and in default thereof that he be committed to the House of Correction of Milwaukee County, Wis., and stand committed until said fine is paid.

Further Ordered that execution of sentence be stayed for five days.

And It Is Ordered And Adjudged by the Court that the said defendant Alfred Tessen, alias Al Taustin be imprisoned in the House of Correction of Milwaukee County, Wis., for the term of three months and that he pay a fine of $100.00 to the United States and stand committed until said fine is paid.

Further Ordered that execution of sentence be stayed for five days.

And It Is Ordered And Adjudged by the Court that sentence of the defendant August Becker be suspended for one year with leave to said defendant to make application to withdraw his plea of guilty heretofore entered and move for dismissal of the action.

And It Is Ordered And Adjudged by the Court that the sentence of the defendant Floyd Granger be suspended for one year with leave to said defendant to make application to withdraw his plea of guilty heretofore entered and move for dismissal of the action.

51 UNITED STATES DISTRICT COURT.

* * (Caption) * *

BILL OF EXCEPTIONS ON BEHALF OF THE DEFENDANTS.

Filed Jan. 11, 1936.

Be it remembered, that on the 2nd day of December, 1935, being one of the days of the October 1935 Term of the United States District Court for the Eastern District of Wisconsin, before Honorable F. A. Geiger, Judge of said court, this cause came on for arraignment, plea and trial upon the indictment heretofore found herein, E. J. Koelzer, Assistant United States Attorney, appearing for the government and G. F. Clifford and Thomas E. Leahy, Attorneys, appearing on behalf of the defendants Hyman Wainer, alias Heinie Wainer, alias Henry Wainer, Louis Wainer, Donald Blink,
52 alias "Buck" Blink, Charles Christenson, alias Charles Christianson, Ervin Dorschner, alias Abe Dorschner, George Davis, alias "Shorty" Davis, Ed Lueke, Merle Ravey, Ed Rossey, alias Ed Rosey, alias Ed Rossi, Louis Sasse, Adolph Siebold, John Trambar, Alfred Tessen, alias Taustin, and Theodore Wallmer, alias Ted Wallmer, whereupon the defendants Hyman Wainer, alias Heinie Wainer, alias Henry Wainer, Theodore Wallmer, alias Ted Wallmer, and George Davis, alias "Shorty" Davis, entered the following special plea in bar as to the first count of the indictment:

"1. For the reason that heretofore they were prosecuted for the same acts at the same place involving substantially the same time under an indictment which was returned as they

are informed and believe in May, 1932, in the United States District Court for the Eastern District of Wisconsin.

2. That a copy of said indictment is hereto attached, marked Exhibit 'A' and made a part of this special plea.

3. That thereafter, to wit: on the 6th day of December, 1932, the said defendants, Heinie Wainer, George Davis and Ted Wallmer pleaded guilty.

4. That the said Ted Wallmer was referred to in said indictment as Fred Walmer and as Ted Doe, but that the indictment was amended to read Ted Walmer.

5. That the following is a correct transcript of the proceedings had and the pleas entered:

'Dec. 6, 1932. Defts., Heinie Wainer, Sam Wainer, Geo. Davis and Fred Walmer in Court with Atty. Waugh, arraigned and each pleaded guilty.

'Dec. 6, 1932. Deft., Heinie Wainer, sentenced to pay a fine of $2000.00, and in default of payment thereof to be committed to the custody of the Atty. Gen. to be by him confined in a jail until fine is paid or he is otherwise discharged according to law. $500.00 to be paid now, and a stay of 60 days granted in which to pay the balance. Bond continued.

'Dec. 6, 1932, Deft., Sam Wainer, sentenced to pay a fine of $250.00 and in default of payment thereof to be committed to the custody of the Atty. Gen. to be by him confined in a jail until fine is paid or he is otherwise discharged according to law. Stay granted for thirty days. Bond continued.

53 'Dec. 6, 1932. Ordered that indictment be amended from Ted Doe to Ted Walmer alias Fred Walmer, and from Shorty Roe to George Davis.'

6. That the fines of Heinie Wainer in the sum of $2000.00 was paid and that the fines of George Davis and Ted Walmer were also paid and that said proceedings amount to placing the defendants twice in jeopardy for substantially the same offense.

7. That the United States is barred from a further prosecution of the defendants for all acts involved in the same transaction to which they have been prosecuted and that the present indictment substantially covers the same acts.''; and entered a plea of not guilty as to the second, third and fourth counts of the indictment; the defendants August Becker and Floyd Granger each entered a plea of guilty; the defendants Louis Wainer, Donald Blink, alias ''Buck'' Blink, Charles Christenson, alias Charles Christianson, Ervin Dorschner, alias Abe Dorschner, Ed Lueke, Merle Ravey, Ed Rossey,

alias Ed Rosey, alias Ed Rossi, Louis Sasse, Adolph Siebold, John Trambar, and Alfred Tessen, alias Taustin, each pleaded not guilty to the indictment.

And the Court having heard counsel in support of said plea in bar overruled said plea in bar, to which the said defendants Hyman Wainer, alias Heinie Wainer, alias Henry Wainer, Theodore Wallmer, alias Ted Wallmer, and George Davis, alias "Shorty" Davis, duly excepted; that thereupon the said defendants Hyman Wainer, alias Heinie Wainer, alias Henry Wainer, Theodore Wallmer, alias Ted Wallmer, and George Davis, alias "Shorty" Davis, pleaded not guilty to the said first count of said indictment.

That thereupon the said defendants and all of them moved the Court for a bill of particulars as to:

"1. When each and every one of the defendants became a party of the alleged conspiracy.

2. What act, the date and place of the last act of each 54 of the defendants in connection with the conspiracy.

As to Count Two—

1. What part each of the defendants had in the alleged operation of wholesale liquor deal business."; and a supporting affidavit, as follows:

"State of Wisconsin } ss.
Milwaukee County }

THOMAS LEAHY, being first duly sworn on oath, says that he was but recently retained by some of the defendants, to wit: about the 30th day of November, 1935; that he did not have an opportunity of seeing the majority of the defendants that he represents until Tuesday, November 26th, and that he did not have an opportunity to confer with all of the defendants that he represents until December 1st, at about 7:00 o'clock, P. M.; That the alleged conspiracy covered a period, generally, of from 1925 to the return of the indictment, and that the first Overt Act is alleged in 1921, when several of the defendants were still in the grade schools and of the ages of eight or nine years.

That as far as he can discover, the situation relates to isolated transactions and to several smaller conspiracies, the majority of which the Statute of Limitations would run against, and that it is necessary for him and G. F. Clifford, representing the other defendants, to know when it is claimed that the defendants became a party to the conspiracy and

when it is claimed they were last connected with it, which information should result in expediting the trial and disposition of said action.

THOMAS E. LEAHY

Subscribed and sworn to before me this 2nd day of December, 1935.

MARIE B. KLEIN
(Seal) *Notary Public, Milwaukee County, Wisconsin"*

55 which said motion for a bill of particulars was denied, to which denial the defendants duly excepted. That thereupon and forthwith a jury was duly sworn and empaneled and the following testimony and proceedings were had.

56 ABSTRACT OF TESTIMONY.

Re: U. S. v. Wainer.

C. R. OLSON, a witness called on behalf of the Government being first duly sworn, examined by Mr. Koelzer, testified:

I am an officer of the Internal Revenue Office and have been since January, 1929. On July 11, I visited the premises known as the Old Ziebel farm and as the Kent farm in Waupaca County in my official capacity and found a large alcohol plant manufacturing alcohol. Other officers went with me. There was a 1500 gallon cooker in a barn in full operation, a large steam boiler, a considerable amount of mashed alcohol. We arrested Joe Kiefer, George Zitsky, John Dirks, Arnold Dirks and Howard Siats. I do not know Mrs. Kent.

Cross-Examination by Mr. Clifford.

Mr. Merkle was one of the raiding crew in which this boy Dirks was shot. Heinie Wainer was not there. I have never made any charge against Heinie Wainer as a result of that raid. Neither Sam nor Louie were connected with it that I know of. It was located on a farm in Waupauca having a capacity of about 1500 gallons. I did not arrest Elmer or Mrs. Kent, but did arrest those named and preferred charges against them. I didn't see any of these defendants at the still.

Redirect Examination by Mr. Koelzer.

I found a considerable amount of alcohol. On January 5, 1931, I visited a farm of Alfred Blink in Outagamie County with officers and seized a distillery, finding a large distillery, mash and a quantity of alcohol. The capacity of the still was 2000 gallons. There was possibly 1000 gallons there. I know Mr. Blink. He was not a resident of the farm at the time. I found people at the farm and arrested Stanley Powell and Harry Marks. The still was not in operation at the time.

Recross Examination by Mr. Leahy.

I arrested no one on the farm, who was connected with this case as a defendant.

MRS. EMMA KENT, a witness called on behalf of the Government, sworn, examined by Mr. Koelzer, testified:

I live in New London. I am the owner of a farm in Waupaca County, Kukwa Township and was the owner in July, 1930, and some years prior to that owned it with my brother-in-law, Elmer Kent. The farm was rented in 1929 and
57 1930. The first time Heinie Wainer came and rented it himself. That is the Heinie Wainer in this court room. He drove out and wanted to know if we wanted to rent the place. He wanted it for storage. We rented it that time, but they didn't stay there only about two months. He didn't say what he wanted to store it for. He paid $15 a month. I didn't know whether anybody went into possession of it then. I didn't see anybody. We weren't living on it at the time. We just rented the barn. The rent was paid. My brother-in-law paid me. I don't know who paid the rent. I don't know whether it was once or twice we got the rent. We didn't even know when they moved out. I was never out to the farm. I rented it again in 1930. Charles Waller came out and wanted to rent it to the Wainer Brothers as storage purposes. I told him to go and see my brother-in-law. Whatever he did was satisfactory to me and he went up there and made some arrangements. My brother-in-law is Elmer Kent and whatever he did would be all right with me. I got the rent from my brother-in-law. Somebody paid him. I never got out to the farm at that time. I couldn't say when I was there

last. After the place was raided, I was out to the farm a week or two after and I found the barn all ruined. The floor was cut to pieces. The roof and granary was gone. The stairway and the stanchions were taken out. There were holes cut in the roof and the chimneys and pipes were there. I went up to Wainer's office two or three times and I never run on to either Louis or Heinie up there, so I wrote them a letter, and they did not answer, so I went back again and finally I ran onto Heinie up there about in December and I told him I wanted the damages paid for the barn and he wanted to know if I wanted it in money or have it fixed. I told him if they would go out and fix it the way he found it, it would be satisfactory to me and he said to go home and forget about it and that he would have somebody out there to fix it. He said $400 was more than the barn was worth. Nobody came so I went back to the office and I left word I wanted to see either Heinie or Louis, and the next morning Louis came out and he told me that Heinie didn't have anything to do with the barn and that he would send somebody
out to fix it in about a week and nobody came to fix it.
58 A week later, Attorney Walter Melchoir came out and
wanted to make a settlement. He offered me $225 and I refused it. They didn't do anything. I went over to Waupaca and hired a legal attorney and he started a suit in circuit court for Waupaca County against Heinie and Louis Wainer. The case went to trial before a jury and I got $500 which has been paid.

Cross-Examination by Mr. Clifford.

I don't know who paid the $500. McHenry paid us. He was our attorney. He gave a satisfaction in our behalf. I never saw the satisfaction you now show me, before. This satisfaction was by my attorney in the particular case and recites that Joseph Howard appeared at McHenry's office and admitted his personal liability and made full payment in satisfaction of the judgment. Louis got up on the stand and denied that they were the Wainer Brothers. We called the operator and they said they were not listed as Wainer Brothers. I have forgotten who our attorney said paid the $500. I couldn't say. Heinie rented the place from us in 1929 in May. Heinie was alone and wanted to rent the barn over on the Ziebel place. We have two farms. I was never out there, never inside of it, but we got the rent. I do not

know that the barn was used the first time for anything. I couldn't say that it was used. In 1930 a man by the name of Walter came out. Heinie was never there to rent it, but Walter came to rent it for the Wainers. He says for the Wainer Brothers. There was no amount agreed up at our house. I never seen Joe. He was never at my place. I do not know who was in possession of the barn at any time or that anybody ever had possession at any time or that anything was in the barn at any time. I saw Heinie after the raid in his office, when I wanted him to make a settlement. He did not tell me that he did not have anything to do with it. I told him I wanted $400 damages and he said that was more than the barn was worth, but he wanted to know if I wanted the money or to fix it, and I said if they would fix it the way they way they found it, it would be all right, and he said to go home and forget about it. He said he would have somebody out there to fix it. That was in the last part of December.

The raid was in July. I made several demands up to
59 July. I couldn't tell the first time I was to Wainers. I had been to his office several times, but never caught him. I did see him at his office just before Christmas. It was Louis that said Heinie didn't have anything to do with the barn and that he would send somebody out to fix it.

Redirect Examination by Mr. Koelzer.

I do not know anybody by the name of Joseph Howard.

ELMER KENT, a witness on behalf of the Government sworn, examined by Mr. Koelzer, testified:

I live three miles west of New London in Waupaca County and I am a brother-in-law of Mrs. Kent. I and Mrs. Emma Kent have a joint interest in the farm that Mrs. Kent is interested in in Mukwa Township. We rented the barn in 1929 to Heinie Wainer for $15.00. He rented it for storage. A fellow by the name of Joe paid part of it and Louis Wainer paid part of it. They occupied the place. I don't know whether it was two or three months. I rented it again to a fellow by the name of Waller. He said the Wainer Brothers sent him out there to rent it. I believe we did rent it then, but I don't know. He said he would see the boys about it. Next one of the neighbors told me there was somebody mov-

ing in over there and I went over there and Mr. Woller was there. We got the rent for three months. This was this Mr. Joe. That was all I could get out of him. That his name was Joe. I didn't know him. I didn't know of a seizure until Louis Wainer came out one night and told me. I forget just what he said. He told me the place was padlocked or raided or something like that and if I didn't want to get into trouble to keep the Wainer Brothers out of it.

(Witness is shown photograph).

I couldn't swear that I ever saw the man. It looks to me it might be Saits. I don't know and wouldn't want to swear to it. He is the mysterious Joe. It looks something like him. It don't exactly look like him, but it does some like the man who paid the rent and said his name was Joe.

Cross-Examination by Mr. Clifford.

60 The man who came out to see me was Charles Woller. It was he that was on the place. The man who paid me didn't tell me his name. He told me to call him Joe and I knew him as Joe. I wouldn't swear to the photograph marked Exhibit 1 and 2 were of Joe.

ALBERT BLINK, a witness called on behalf of the Government, sworn, examined by Mr. Koerlzer, testified:

I live at Nichols, Outagamie County and own a farm in Outagamie County and I rented it during 1930 to several parties. I rented the building to one party and the land to different parties.

"Q. Who did you rent the building to?

A. I hardly know how to answer you. I went down to rent it to Wainer Brothers to handle cattle and so forth, and, well, that was—we were talking, and they said, 'Here is George Morks; let him go on that place."

I wanted $300 down on my rent. I wanted $1200 a year. I had my taxes to pay. I got this $300 and Morks came up and gave me $300 with a contract. I throwed my contract in the drawer and took my $300 and was tickled to death to get it. In the fall when I went down to look at it, the barn was wrecked and I went to the Wainers for damages. I wanted Wainer to fix it. He said he didn't have anything to do with it. He wouldn't pay it, so I started suit in Appleton. I

looked at the contract and the contract was with Merks entirely. It was not Wianers at all. The suit dragged along for a couple of years. I turned it over to Mr. Morgan and he got the money. I don't where he got it from but he got some money for me. I wanted Heinie to fix up the barn. The contract was to keep the building in repair, mow weeds and so forth, and he refused to do it. He claimed he hadn't rented it at all. The two Wainers were there at the time I went down to see them and Mr. Morks was there. I was told the barn had a still in it and after that I just stayed away. I did not see any men in there after I rented it.

Cross-Examination by Mr. Clifford.

I never saw Louis or Heinie Wainer about the premises. I live at Nichols, Outagamie County. New London is partly in Waupaca. I went down to see the Wainers about renting the barn. I felt that I had rented it to Wainers, but it really was Merks. He said, we will turn it over to Merks, or something to that effect. I had a written contract with Merks.
61 The rent was paid by Merks and was never paid by either of the Wainers. When I went to them about fixing the barn, they told me they were not interested and had nothing to do with it. Then I commenced an action which was dismissed after my attorney told me there was no cause of action. He told me something to that effect. I am the father of Donald Blink and Earl Blink, two of the defendants.

The Court:

When the case was dismissed, I was paid $130.00 by my lawyer, John Morgan.

JOHN MORGAN, a witness on behalf of the Government, sworn, examined by Mr. Koelzer, testified:

I am an attorney at law practicing in the city of Appleton. I have known Mr. Blink for a number of years. He retained me to institute suit against Henry and Louis Wainer. I started a suit in the fall of 1930 in the Circuit Court of Waupaca County, charging the Wainers as lessees for certain property damage being done as tenants. Finally negotiations were entered into for settlement. One day a man who was a stranger to me came to me and paid the amount which I ar-

ranged to settle for which was $225.00. I turned it over less my fees. It was paid in cash by a man who I have not seen since and who gave no name. (Witness is shown Exhibits 1 and 2.) I do not believe I ever saw that man.

Cross-Examination by Mr. Clifford.

I wouldn't say that any member of the defendants here in court paid this money to me. He was a stranger to me. He came to the office and paid the money. I didn't know anybody by the name of Merks or Morris. I found there was a lease to George Merks and not to the Wainer Brothers. The lease was brought to my office a considerable time before I started action. Elmer Hunkamp and Roger Tuttrop were attorneys for the Wainer Brothers. In the settlement, I did not ignore the attorneys for the Wainers. The attorney for the Wainers was the man with whom I arranged the amount of money. It was decided between Mr. Hunkamp and myself. I do not believe there was a stipulation entered into. I prepared a petition and gave it to the attorney, asking that the action be dismissed. Hunkamp was not there when the money was paid.

PAUL OVRUN, a witness called on behalf of the Government, sworn, examined by Mr. Koelzer, testified:

I am the clerk of the Circuit Court for Waupaca County and have with me the record in the case of Emma Kent *vs.* Heinie and Louis Wainer. The record shows the final disposition was a satisfaction of the judgment in favor of Emma
62 Kent and Elmer Kent. There was a jury trial.

"Q. Jury trial. And the verdict was in favor of whom?

A. Of the plaintiffs, Emma Kent and Elmer Kent.

Mr. Clifford: Now, I want to object to the materiality of these various details in the record. It should be limited to the satisfaction of the settlement of the claim.

The Court: I don't know what they are going to offer.

Mr. Koelzer:

Q. Have you with you the original complaint filed?

A. Yes, sir.

Q. And also the proceeding had in the action?

A. Yes, sir.

Q. Have you with you the record of the suit of Albert or A. J. Blink versus Henry Wainer and Louis Wainer?

A. Yes, sir.

Q. And that was a suit instituted in the Circuit Court of Waupaca County, Wisconsin?

A. Yes, sir.

Mr. Koelzer: If the Court please, we offer both records in evidence.

Mr. Clifford: I am going to object to the materiality of their being offered in the record as a whole unless he points out the parts that are material.

The Court: Well, isn't the record as a whole competent, the entire record? I suppose if the plaintiff offered part you would have a right to insist upon the whole record. It may be received.

Mr. Clifford: May we have an exception?

Mr. Koelzer: That is all. Take the witness. I ask that the record in each case be marked for identification.

The documents referred to were marked, respectively Exhibits 3 and 4."

WILLARD G. MALSIE, a witness on behalf of the Government, sworn, examined by Mr. Koelzer, testified:

I am enforcement agent of the alcohol tax bureau and have been in the Internal Revenue office since 1927. I made a seizure on some premises in the vicinity of Supple Coal Yard at Fond du Lac, October 21, 1932. We found a distillery in the course of erection which included two large steam boilers, fifty-horse power steam boilers. The boilers were not set up. They were standing there, but they did not have the smokestacks on them. There was cross-section smokestacks to carry it on out to the roof through a hole. There were 18 vats in there, each vat was 12 feet high by 11½ feet in diameter. There was scaffolding in there
63 that is used in illicit distilleries for holding dry boxes, and different other things they have around a distillery. There were three large steel vats or steel tanks, estimated capacity of about 1,000 gallons each tank. There was one immense steel tank there of about 5,000 gallons capacity, inside this barn. This was seized or found in a barn, a new

hay barn, about 20 feet from the front doors. The doors opened clear across, or clear up on the place. There was a regular bridge built there where trucks could back up this heavy timber, right up to the tops of the vats, and the barn was probably, oh, 125 or 130 long, and 50 or 60 feet wide, and the vats took the whole rear end of the barn, or, that is, all except about 25 feet in front, filled with these vats and there were 100 or more empty cardboard cartons there and pipe fittings of all kinds from valves and knuckles and elbows and all those other connections; there were a great many plumber's tools there, threading machines and pipe wrenches and cutting dies or whatever you call them, and hundreds of feet of hose. There was a gasoline engine. There was a steam pump—two steam pumps. Under this scaffolding, or this bridge-like affair I was speaking of, there was a hole dug there where the pumps were set up to pump water into the vats. There was no mash there at the time. That was about all. Of course, the items each different thing that was seized,—there was hundreds of things seized there, but, as a whole, it was pipes and fittings, and the vats and boiler and tanks. It was a regular wooden barn and the cracks were sealed with tar paper so you couldn't see inside. It was on the edge of the Supple property down by a swamp probably 1000 feet from their main office. There were big haystacks all around this barn. They had a tool shed, piles of coal and coke. It appeared to be an illicit distillery in the process of construction. I did not notice any odors except the tannery which was pronounced. It would have been strong enough to kill the odors of mash if there had been some. I notified prohibition agents and left word with them to notify me as soon as the still was destroyed and where he placed the seized property, not to destroy any of the
64 property but to place it in storage. It was stored in the DuFresne Warehouse, at Fond du Lac, Wisconsin. It was turned over to the Bureau of Fisheries. I was special agent in charge at that time. I was informed that it was hijacked from the warehouse. I supervised the recovery to the extent of locating it.

Cross-Examination by Mr. Leahy.

I arrived about noon and inspected the plant about 2. I had it under observation a few minutes. There was no one there, no alcohol and no mash.

Redirect Examination by Mr. Koelzer.

I don't recall the subdivision it was in. It was a new subdivision. I am sure that it was the Bannister subdivision.

LOUIS J. SUPPLE, a witness on behalf of the Government, sworn, examined by Mr. Koelzer, testified:

I live at Fond du Lac and am in the fuel, building material business. I know the defendant, Ed Lueck and have known him for four years. I know Heinie Wainer. I have had business transactions with both of them. In 1932 I first met Mr. Wainer and Mr. Lueck was with him. They made arrangements to handle sugar at our warehouse. It was corn sugar in carload lots to be handled through our warehouse, for a period of about a year I guess. It would average about a car every other day or four cars a week. We did the unloading of it at the warehouse. That's all we did. We didn't do any delivering. I think they hauled it out. We did unload the cars and the warehouse would be pretty near empty. We had someone in charge of the warehouse. Their men could get in. They had a key and could get in and haul it out whenever they wanted to. By they I mean Mr. Lueck. I do not know that Wainers had one. Lueck paid me. Sometimes the driver would pay it. That's Mr. Lueck sitting in the court room. I made the terms of payment with Lueck. I never had any talk with Wainer about handling the sugar except the price to be paid. We were to warehouse it at 5c a sack. We sold the same people coke. I observed the truck, but they would not have any names on them. One of the drivers was Davis, one of the defendants. I did not hear the names of any other men. They were taking a load or two a day of coke sometimes seven or eight tons at a time. By "load" I mean a truck load. I had some dealings with Wainer or Lueck along about the time they made arrangements to build the barn on our property. We sold them three lots. It was in the Bannister and Lewis Subdivision of Fond du Lac. Wainer and Lueck looked the ground over and decided it was a good location to build so we made arrangements to sell the lots to them. I sold them and was paid for them by Mr. Lueck. They said it was a good location for a plant. There was a marsh nearby there and the odor from the refuse.

being dumped in there from the tannery would throw away the smell so you could not detect any smell of mash. They didn't say they wanted to build a still. They just wanted to build a plant there. Then we made the deal for the property and we were to order the lumber for it and they furnished a man to build it. They figured the smell from the tannery would throw off the smell from their plant. The deed was given in the name of Balsam, as grantee. Nobody associated with them by that name. I do not know Balsam. They told me to make the deed out so I made it out. I never met anybody by the name of Balsam. The only transaction we had after that was selling the coke and sugar, outside of paying for the building. I know the building was erected on the lots. We bought lumber, furnished it and they paid us. This was from Mr. Lueck. Wainer was not there at that time. I have seen him around several times, but I didn't talk to him. After that, I seen him I think twice while it was in construction. It was in the yard. He looked around and drove out. I didn't see him talk to anybody. I did not see any equipment go into the building. I paid for the lumber. Lueck paid us. Dealings were in cash and I never got any check. I met Lueck first. He introduced Wainer to me as the boss. I have the records as to the transaction of corn and sugar.

Cross-Examination by Mr. Clifford.

Without going all through the records, I never made any record of a transaction to Mr. Wainer or in Mr. Wainer's name. The sales slips were made to some one else. This deed was to Balsam. Wainer was not present when the deed was drawn. He did not pay any money. I can't
66 fix the exact date I saw Mr. Wainer. It was early in 1932. I had been doing business with them all spring handling sugar and coke. The first time I think was in May or June. We were running a building material warehouse, then storing cement and lime. We warehoused sugar in one of the buildings. It was not a warehouse that sugar would be ordinarily stored in. I have known Lueck about eight or nine months. I had never known Wainer before May 1932. I had had dealings with Lueck before May 1932. Lueck introduced Wainer to me down in the yard. We had transactions as to coke and sugar and was in the process of handling this before I met Wainer. I dealt with Lueck in arranging the terms. It was Lueck that paid me and it con-

tinued on for a period of several months. Lueck brought up the question of lots, buying some lots and I arranged the terms of the deal. We did not go to a lawyer's office. A real estate company drew it up. We just called him up. We didn't go to his office and told him we wanted to make a transfer. They fixed the deed up. He was a friend of mine. Lueck did not go to the real estate company with me. I arranged the deed between Lueck and myself. They didn't come out and say there was a still, but I knew what it was going to be. We did sell them lots and lumber knowing what was going to be done. The building was being put up during a period of six weeks. Wainer was around a couple of times. He drove in there. He wasn't there all the time and never directed the building of it in any way. He never gave any orders that I know of. I didn't see any of the drivers around the new building nor any of these fellows here. The place was raided next to me. I never saw Louis Wainer at any time nor had any dealings with him.

Redirect Examination by Mr. Koelzer.

The accounts were kept in the name of G. Brown. I suppose because they didn't want to use the right name. The approximate volume of the business we handled for them might have been six or seven thousand dollars for a period of a year and a half. We continued to sell them coke in 1933. We didn't have much to do with them after the still was raided. We didn't have any more sugar.

Recross Examination by Mr. Clifford.

67 I don't know that there was a George Brown. There was a Bill, but I do not know George. I don't think that Bill was referred to me as the owner of the plant, but just as Bill. He used to come around with the fellows. I think he was present at the time this deal was made. His name was Bill Kurtz. I don't know if he was the owner. I know he had something to do with it. I had some dealings with him. We had dealings with reference to the storage of the sugar and buying the coke.

"Q. And he was the one that you had more to do with than you had with Lueke, wasn't he?

A. Well, he and Lueke was together.

Q. This man Kurth paid you for the building, didn't he?
A. No, I think Lueke paid me for the building."
Kurth paid us for handling the sugar and coke sometimes. Wainer never paid us anything himself.

Redirect Examination by Mr. Koelzer.

This man Kurth is from Fond du Lac. I do not know where the corn sugar came from. It came in there, and the railroad company had spotted it at our warehouse and that's all we know about it. We know that the corn sugar came from the Clinton Corn Products Company at Clinton, Iowa. I have known of the New London Products Company. Sometimes box cars would be marked in their name. Corn sugar payments were made by Wainer's men. I don't think a George Davis ever paid me. They did haul away some during the day time. Most of it, I guess, was taken away at night, but I never saw it.

DOUGLAS SUPPLE, a witness on behalf of the Government, sworn, examined by Mr. Koelzer, testified:

I am associated with my brother, Louis Supple and have charge of the yards. Some days there would be one come in and maybe miss a couple days. Then another would come. We would unload it at the sheds. I had a key for it. I would always open it up and unload the cars in that shed and at night, they would come and get it. I was never around at night when they got it. I never saw any men that came and called for it. Every bag had markings on it. They were shipped to the New London Products Company. I do not know the defendant, Henie Wainer. I know Ed Lueck.
68 He was around the car. He would ask me if one car would be unloaded. I saw empty trucks. I never saw any of the men drive them.

Cross-Examination by Mr. Clifford.

I have never seen any of these defendants before outside of Lueke.

ELMER GRANGER, a witness on behalf of the Government, sworn, examination by Mr. Koelzer, testified:

I live in New London. I am a brother of Floyd Granger, who entered a plea of guilty in this case. I am known as Stub. I know Pete Bondie and got acquainted with him in New London. I met him at the Perky Still between White Lake and Langlade. He was on a tail car and I was on a corn sugar truck. A "tail-car" is the car that watched the road behind you to see that there wasn't any hijackers and tell you when it was clear to go into the joint and when it was not. I was working for my brother, Floyd Granger. I know some of the men here I have seen Buck Blink at a White Lake still. I met Buck Blink there once. Pete Bondie asked me if I would go on a job with him—the Government still that was stolen from the Du Fresne warehouse at Fon du Lac. He said hijackers had stolen a still from him and they were going to steal it back.

"Q. Who came to you?

A. Pete did, and he asked me if I would go on a job with him. He said hijackers had stole a still from him and they were going to steal it back. And I told him sure I would go and asked him the price, and he told me what he would pay me and I went with him. I loaded out the still and went home again. Pete got arrested and was taken to jail and Sam Wainer come to me and told me I had better get out of the country for a while, to get in the sticks, and he gave me eight dollars to leave with, and in the meantime, while I was up there I wrote home to my mother and told her I had to have some money for I was going to stay up there and I guess she talked with Sam and Sam gave her some money to send to me. Two or three different times he sent me money.

Mr. Clifford: I move to strike that out on the ground that as concerning these other defendants the transactions with Sam Wainer and Pete Bondie are immaterial until that act and those people are connected with the conspiracy.

The Court: the motion is denied.

Mr. Clifford: May I have an exception?"

I never had any further conversation with Sam Wainer or Heinie Wainer or any member of the Wainer family relative to taking away distilling equipment from Fond du lac. Many men were working there that night hauling away the equipment from the warehouse. I had five men with me working.

I had to see that we got it in a hurry. I do not know who
69 they were. Some were from Milwaukee. Pete did all the hiring. I don't know whether those men were in the cartage business.

Cross-Examination by Mr. Clifford.

The only one that had anything to do with any transaction was Buck Blink on the still up north.

HAROLD JENKINS, a witness on behalf of the Government, sworn, examined by Mr. Koelzer, testified:

I am an investigator from the Alcohol Tax Unit and was a special agent in the Department of Justice to investigate the disappearance of the still at the DuFresne Warehouse at Fond du Lac in April 1933. I recovered it at the Helmar Milling Company in some garage located at Fond du Lac.

"Q. Did your investigation disclose who stole it?

A. Pete Bondie was arrested and entered a plea of guilty to the charge.

Mr. Clifford: May I have the same objection as to this Bondie transaction, to this testimony?

The Court: Yes.

JOHN F. KUEMMERLEIN, sworn, examined by Mr. Koelzer, testified:

I am an officer of the Bureau of Internal Revenue and have been a United States officer since 1922. I visited the Rossi farm in my capacity as an officer with another officer. It was a brewery that was found in the residence basement. It was a wildcar brewery and had beer tanks and containers and some barrels. I could not say accurate how much. There was quite a number and several men were arrested but I did not make the arrest.

Cross-Examination by Mr. Clifford.

I think Rossi was the man arrested. I don't remember whether Ed Rossi was the man arrested and whether he

pleaded guilty. I wasn't in charge of the expedition. As far as I know there was none of these defendants had any connection with the Rossi farm.

EDWARD GOLDY, a witness on behalf of the Government, sworn, examined by Mr. Koelzer, testified:

I am an officer of the Internal Revenue Bureau. In January, 1933, I met Sam Wainer, Adolph Siebold and Earl Blink on Highway 41 in Oshkosh. On January 13, about 5:30 P. M. I had information that a large truck of alcohol was being moved on Highway 41 between Appleton and Fond du Lac. It was a cold wintry day, snowing hard. About two o'clock we observed this truck traveling along Highway 41. We followed the truck and I noticed it pull over and stop. It indicated that one of the wheels had broken down. There were some men standing around the truck, but I could not distinguish who they were. We kept this truck under observation until five thirty. Then there was a Chevrolet truck backed up to the big truck and I saw Sam Wainer, whom I saw at the commissioner's office in Green Bay with Earl Blink and Adolph Siebold rolling fifty-five gallon drums of alcohol from the big truck to the Chevrolet. I made my identity known and Wainer turned around. Blink backed up and was told to step back into the truck where Siebold was with Wainer. I asked him what was in the drum and he said nothing. I told him to open it. He said you open it. I found there was alcohol. There was about 1650 gallons in 30—55 gallon steel drums. They were placed under arrest. We found Siebold's Plymouth parked about 200 feet ahead and later at his farm we found with several tons of wrapping paper, counterfeit caps and labels for whiskey bottles, etc. There were no distinguishing marks on the drums. They were painted on the side with white ends. Siebold is one of the defendants.

Cross-Examination by Mr. Clifford.

The Blink referred to is not the Blink sitting here. The only man here is Siebold who lived in Oshkosh. He had a farm outside of the city on which he was raising guinea pigs. The information was the truck was going between Appleton and Fond du Lac. We followed it from the Fair Grounds

into the city of Oshkosh. When it stopped it was still on Highway 41 and the next day, I went with Siebold to his place. I had received information that they had been storing large quantities of whiskey out there. He said he lived on a farm and I could go out with him and he said I will take you out. There was nothing there except several tons of wrapping paper for whiskey bottles, and labels and caps and such as that. There was everything for a cutting plant with the exception of counterfeit stamps. There were no bottles and no alcohol on the farm. This truck was not going in the direction of Siebold's farm.

Redirect Examination by Mr. Koelzer.

I arrested these men. They refused to make any statement or answers to questions.

71 ELMER GRANGER, a Government witness, recalled, examined by Mr. Koelzer:

I recall trying to get some corn sugar in Milwaukee. We were hauling corn sugar from here to an alcohol plant Appleton, getting it through a fellow by the name of Irv. The plant was in the city of Appleton. It seemed Irv's checks were no good. I couldn't get the sugar. I called up Heinie and he said he would fix it. He would call Garney or some name as that and he would get us permission to take the sugar up. I told Heinie that Irv was behind on sugar payments. They would not give us any more and asked him what about it and he said he would fix it up. We called up there. He said that Carney was the man he was getting it through now. I hauled corn sugar for about a year and a half. I worked with Floyd and a fellow named Art and Fritz Croon. Heinie and a fellow by the name of Frank Williams came to the house on two different occasions and accused me of stealing alcohol from them in New London. I never had any other dealings with relation to alcohol or corn sugar with any of the other men here.

Cross-Examination by Mr. Clifford.

I stole a few gallons of alcohol. I do not know whether it was in 1931 or 1932 that I called them up. I called here in

Milwaukee to a hotel and from then on we got our sugar from Gronik. I never saw Wainer about it. I just called on the phone and asked if it was Heinie and he said yes. I asked if it was Heinie Wainer.

ETHELMER FUHRMAN, a witness called on behalf of the Government, sworn, examined by Mr. Koelzer, testified:

I am 36 and live at New London. I have lived there practically all my life. In 31 I moved from Milwaukee to New London and I was employed by Heinie Wainer on different jobs in connection with alcohol and liquor. He employed me at New London at either of $30.00 or $35.00 a week. I was paid during the time I worked. I worked in 1931 and 1932 in jobs connected with alcohol and liquor. Sometimes I was paid by Heinie Wainer. At times, I was paid by Joseph Hoffman. That was the only two bosses. Payments would be made in the Wainer office in New London. It was a cattle and hide business. I did various jobs such as delivering and canning alcohol, loading, delivering some at Oshkosh. The
72 canning would take place in the Rusch garage right back of the Rusch garage; in New London also at Heinie Wainer's home at the outskirts of New London. There were several men working for Heinie Wainer. There was Donald Blink, Earl Blink, Louis Sasse, Johnnie Trambar and Abie Dorschner, Jim Ravey and a few others. Those are men here and I named them. They would help putting alcohol in tin cans, taking it out of the 55 gallon drums. I never worked in any still or did any hauling. There was one place where alcohol was stored in Oshkosh. I took orders from Earl Blink, Sam Wainer and Joe Hoffman who was the man at the office. I stored alcohol in my own home in 31 and 32 in one gallon cans and also 55 gallon drums and Canadian liquor. I had a large basement in my home. I was asked to store it by Heinie Wainer and was to receive money for the storage. He came to my house to check up the stuff and how it stood and what he had left and what went out there. I did have a quarrel with him in 1932. When I left him I had quite a bit of stuff in my basement. I took that and carted it off. One day he came up and wanted the stuff and I told him it was missing. He grabbed me by the throat and tried to choke me and I gave him two minutes to get out of the house. I said that I would do something to him. He deliberately

walked in the place as I had the place locked, and a party by the name of Johnnie Trambar opened the door with a skeleton key and came in and caught me in my kitchen where the home was located. Trambar is one of the men here. He wanted to know why I did it. I told him we were through and I figured that was my storage. I met Louis Wainer.

"Q. During the time that you were employed by Heinie Wainer, did you ever meet Louis Wainer?

A. I did.

Q. Did you work with him at any time?

A. No, I did not.

Q. What would Louis be doing at the times you would meet him?

A. The time I have known Louis Wainer, he wouldn't have nothing to do with the alcohol or liquor end of it.

I never had any particular conversation with these other men about any business, just what we had to do and where it was going. I know where one still was located on Nichols on the Blink farm. The only time these men ever discussed the still was when it was raided. I have been around the barn back of the Elwood Hotel at New London. It was used
73 as storage for empty alcohol drums. I did not put any empties in there, but I took them out under instruction from Joe Hoffman and Heinie Wainer. Hoffman gave a number of orders to different men. Sam Wainer also gave orders. I had something to do with unloading corn sugar in Shawano one night. Davis was there. Donald Blink and Earl Blink were there. They did not haul at the same time but at different times. I met them while I was hauling and I unloaded their trucks as they came and placed them in storage. They took part in canning at times. They would switch about. One person would have nothing to do and he would go along and can depending upon how we were rushed, doing odd and different jobs. I helped unload liquor off the cars at three different times. One place was at Appleton and one was at Shawano and one at Bonduel. The first carload of liquor was in containers of canned tomatoes in cartons. They were labeled canned tomatoes. Liquor was taken to my home and stored. One carload from Shawano was taken, a part of it to my home and the other to Mr. Wainer's home at New London. The liquor would stay there about three months. In taking it away, I would load it in different cars, cars from different cities, etc. They would be liquor runners. I never worked with Adolph Siebold, but he was around

at times where I was working. He lived at Oshkosh. There was no home on the guinea pig farm at that time. I guess there is now. There was liquor stored at the guinea pig farm. I did cutting work in Heinie Wainer's home. I worked at that myself. Trambar, Sasse, Blink and Wainer would help me at times. I worked around a brewery. I would take alcohol out to the brewery. There was a brewery in the Platt house. One was in the country. It was east New London. Merle Ravey worked there. He was one of the defendants. I know Abie Dorschner. He worked there at times. So did Tessen. They would bottle beer and keg it. I know Sid Freeman. I never saw him at work, just what he said to me. He said he was setting up a still for them. He was a plumber by trade. The trucks would be kept in the garage back of Rusch's Service Station. It was not the Buick garage. It was a garage that was rented. I took cars at the Buick garage
74 in New London at the request from Sammy Wainer or Joe Hoffman. Most of them were cars we were to load with alcohol. Sometimes liquor. We would load them at my home or Mr. Blink's. It was then placed back in the Buick garage. I made deliveries of liquor to customers. I made one to Plymouth and a few other places. I loaded up cars from Illinois with liquor. I don't know just where these cars were from. There was one seized. Clifford Rossi was driving it. I think it was seized in Minnesota. I have been out to the Rossi farm and the Sasse farm. There was alcohol and liquor stored in those places. We were having considerable trouble with boys from town stealing. Several of the boys got beatings from our working men who were working for the so-called Wainer Syndicate. There was no liquor stored in the Ford garage in New London that I know of. I didn't keep any cars there. That was after my time. They were registered in different names, in the names of some of these men on trial. I did not hear a conversation why they were registered under different names nor know any of the men under whose names they were. They might have been fictitious names. I couldn't say. I saw Heinie Wainer pay wages to Earl Blink, Buck Blink, Trambar, Sasse and Dorschner and Becker, at the same time, I got paid Saturday nights at the Wainer office in New London. I never made a trip to Galesburg, Illinois. I did haul empty cans from the cars and store them. They would come in on Freight cars. They were stored in back of Rusch's Service Station. At times we would fill the cans there and other times we would haul them out to

different places at night where we kept alcohol to fill them. The average truck would hold about 700 gallons of alcohol and such a load would go to one purchaser.

Cross-Examination by Mr. Clifford.

None of these things that I have testified to happened within three years from May of this year. All of them were prior to three years ago. From sometime in May, 1932, I have not been connected with the Wainers in any way. After June, 1932, I know nothing of any handling of alcohol. On June 4, I pleaded guilty to robbery of a farmer with arms and was sentenced to Waupun for 10 years. I was arrested prior to June 4, a week before the latter part of May. Since then I know nothing of the Wainers. I was employed by the
75 Wainers up to five months before that case was tried.

I got a Christmas present in 32. It must have been three months before. My association with the Wainers relates to 31 and part of 32. I was running a saloon in Shawano in July 1931. I bought some beer from them after that. My knowledge of these men was back to three months in 31. Eric Jensen was the man who was in this crime with me. I have not any particular feeling against Heinie Wainer. I was not bitter at him at the time. I had an argument the last week I was working with Trambar and Heinie. It was some time in 32. I went back with him after I ran my saloon several months. Jensen and I might have been running around for a couple of months, a few hours, now and then, a week. I did not know of Siebold in four years. I haven't had anything to do with Davis since June 1932. The middle of 31 I did not work for the Wainers. I went in the saloon and took my license in July 1931. I did not operate until Christmas. I was working for Wainers at the time. I did have something to do with Tessen in loading at various times. He helped me with various jobs. I was too busy to know the days. I know nothing of Ted Wallmer. As far as Ted Wallmer is concerned, I know nothing. Before June 4, 1932, he had nothing to do with it, that I know of. Louis Wainer is a farmer and cattle buyer up there. He is a good hard working farmer. He did not have anything to do with the alcohol business as far as I know. Dorschner worked with me several times some time in 1932. I think it was connected with beer.

EGBERT MATHEWSON, a witness on behalf of the Government, sworn, examined by Mr. Koelzer, testified:

I am 22 years old and live in New London. I know Heinie Wainer, Sam Wainer, John Trambar, Ed Rossey, Chuch Christenson, Louis Wainer, Blink, Shorty Davis, Wallmer and all of them. Louis Wainer lived out of the city limits. He did live on Waupaca Street in 1932. There was a barn on the premises. I. know there was a labeling machine there and quite a few fancy whiskey bottles, beer bottles and a few that looked to be oil burners. There were a few coils there. There were easily 100 cases of empty beer bottles. I have seen practically all of these men at one time or another. I
76 know where the Wainer stock yards shed is there. I have seen steel drums there, cases of beer and ale to the extent of thousands of cases. I think the drums were empty. They opened a few of the ale cases, examined them and drank some of it. I seen these men driving in and out. I have seen trucks go in and out. I could not tell whether they were loaded or not. I have been out to the Rossi farm and saw cars go in and out apparently being loaded. I saw beer barrels and cases around there. I can't say that I saw men handling them. I was around Rush's filling station in April, 1932 with Tuffy Sewall. Gerald Besaw, and I saw Dick Mathewson, Gene Surprise, Leuellin Longrie. There seemed to be some alcohol in there, canned alcohol. I later went back there and saw a large van unloading drums of alcohol. One of them in the van was San Wainer. I could not say that Abie Dorschner was there. I heard Sam arguing with one of his men on how many drums of alcohol they could can in an evening in a certain length of time. We helped ourselves to some of the drums of alcohol. We got ten drums of alcohol altogether and we stored six drums in a vacant building about a block from the place that we got it and then we four drums over where I lived, to my residence. We had a four wheel trailer, and used a car. The next a van was there and they took the drums out. I cannot recall who was driving the van. The name on the van was the Triangle Produce Company. I seen it around town quite a few times. I have been at the home of Heinie Wainer on Pine Street and got into the basement. There were 15 or 20 barrels of whiskey. I and some other boys took alcohol off a truck back of the Buick garage and hid it. Later it was found out that we hijacked this van and we were ap-

proached by Heinie and two strangers and they demanded the stuff we had gotten. I don't think they got any of it back. I know where the Ford garage is in New London and I had an opportunity to observe that place during the years 31 and 32. I noticed trucks go in and out and some of the men here driving them and hanging around this garage. These men were known to be working for the Wainers. I know where the farm of Charles Scheid is. I have been there, but I never seen any alcohol there. There were empty cartons. We helped ourselves to some of the cans. We hid them in
77 a vault. We got another fellow with a car to go out and get them. One of the boys, the Blink boys, ran into them, stopped them and recovered the cans from them. I had got home and somebody wrapped at the door. One of my friends told me he was in a jam and I went outside and Heinie Wainer was there and he grabbed me and wanted me to come along. My friends were there but instead of going with them I fled through the front yard and over on to Shawano Street. I saw him the next day and he claimed I had stolen some alcohol from the Sasse farm Thanksgiving night and he wanted me to give it back. I told him I had not stole any. He threatened me if I didn't come clean with the stuff. It wouldn't be safe for me to walk the streets. I went out to the Rossi farm afterwards, four or five years ago. It was longer than 1932. I was out there on different occasions. I don't know of being out to the Rossi farm, but I recall going to some farm. We went out there that night. Stub Granger and I knew about the place. He said we should go with them. It would be an easy haul so I went out and started to load the McElroy truck with alcohol. We had a fair load when we noticed that cars were approaching the Rossi farm from both directions and we were trapped, so us fellows run, and George McElroy stayed there, and I guess he was beaten up by the fellows who caught him. We left.

Cross-Examination by Mr. Leahy.

I am 22 years old. I haven't a steady job. I have been arrested and convicted for stealing. We entered the barn because of suspicion. There was alcohol or beer there. We went there to steal it. It was our intention to steal it. I went out to the Rossi farm four or five years. I was then 16 or 17 years old. I did not steal

alcohol. There are two farms known as Rossi farms. I did not steal alcohol drums there. My friends did not that I know of. I didn't help load these drums that we had stolen. We were not invited into Heinie Wainer's basement. We were observing the place and we decided to take the joint for what was in it. I don't know if they broke in or not. When I went in the door was open. Some of my comrades were already in the house before I went in. We had no key but
78 I wouldn't say they broke in. The door was open and nobody home. I and my friends stole those cans and sold some of it, but we stole it to sell.

HERBERT SCHRADER, a witness called on behalf of the Government, sworn, examined by Mr. Koelzer, testified:

I live in New London and have off and on since 1920. I am 32 years of age. I am serving a term in the State Penitentiary at Waupun for larceny of an automobile and driving it without the owner's consent, which I took at a still up at Antioch. We got some information from a watchman that a still was in operation so we drove there and found two cars. There were two automobiles loaded with alcohol, one having 250 gallons and the other car just being loaded about 40 gallons in it so we took them and went off. There was 870 gallons of alcohol in all and we hauled it out. We took the alcohol and our own cars to Green Bay. We were arrested, tried and convicted at Antigo. The watchman was Sid Freeman but he was going under the name of Jones. I was up there twice watching them. I didn't steal any truck. It was cas. They belonged to the Langlois Brothers. I was trucks and a little panel job go in and out of the Ed Rossey farm. There was a place on the farm and a cottage. There were several cases of beer and bottles in it. I know Floyd Granger. I followed him in 1932. I saw him loading corn sugar in the coal sheds in New London so we figured he was taking the sugar to a still and I and a fellow by the name of Art trailed the load to Cecil to a farmer's yard. A few nights later, we went up there and there was a large still back there in the woods. We looked it over and there was a federal man by the name of Goldy and Golz and so I talked the matter over with them and they said it would be a good idea to turn it over to them. I notified them about it and two or three days later they picked me up at Green Bay and we

drove out and I showed them where the still was and they knocked it off. The night I was going out, I noticed a car that I had seen in New London several times was driving up and down the road as we were walking to the still. I don't know who the driver was, but I had seen the car around New London, but I didn't know who it was at that time.
79 I didn't see Blink. We didn't see him that night. We saw him about a week later. He was driving this car that I had seen near the still. I didn't think there was anything in the car. He was at the head of the sugar truck, the one that drove into Cecil. In April 26, 1933, I went to the Rossi farm with Siebold, Clifford Dawall, Edgar Mathewson, Dick Mathewson, George McElroy and others. I was in New London in the afternoon and Granger approached me and asked me if I wanted to hoist some alcohol. I said I wasn't crazy about it. That night they picked me up and Mathewsons and we drove out to this cottage, and we got out there and Granger was to make the entry to the house, and we was to go down into the basement and carry out the alcohol. I and he went into the basement and released the door. The truck was at the door and we started to load it and had about 500 gallons on the truck and one of Wainers' cars come with five or six guys in and everybody ran. McElroy stayed with the truck and they made him get out and go in the house. After that I could not see what was going on. Half an hour later a a stock truck that belonged to Wainer drove in and they transferred this alcohol from McElroy's to the stock truck and hauled it away and took McElroy out in his truck. I don't know where they went because I didn't follow them. I could see that Earl Blink was one of the fellows and Al Tessen was there. So was Johnnie Trambar. I did not see Sam Wainer that night. I have not had any dealings with him nor have I had with Heinie Wainer. I went to the Ford garage in New London several times in 1931, 1932 and 1933, and the Buick garage. I have never been in the place back of Rush's filling station. I never saw no alcohol in those places.

Cross-Examination by Mr. Clifford.

I was sentenced in the circuit court for Langlade County for the larceny of an automobile April 18, 1935. I and this man Newman were pals. I never made any statement as to who owned the still. I didn't know that the petition of my

attorney was that people who owned the still lived in Langlade County. I didn't claim that the Langlois Brothers were the owners of it. I don't know who was the owner of it. All I know it was ten miles north on 26, a mile west
80 on a railroad. Ormsey Spur is where it is located about 80 miles north of New London. I knew that this particular plant was there for about 24 days. I actually met Sid Freeman at the place. He said a still was being set up and he would notify me when there was a big load and I could come and get it. I met Sid Freeman. He, one of the parties mentioned, had arranged with me to hijack this particular still. All I know is he was supposed to be the watchman and I was making arrangements with him to hijack it, and we went to Langlade County and attempted to hijack it. I never did any work for Heinie Wainer. My home has been in New London up to 1932. Since 1933 I have not been there very often. I lived in Brown County about two years prior to the time I was arrested in Antigo. As far as I know that relates to two years before the time I was arrested. The Wainer car was a Chevrolet car and Buck Blink was driving it. We were tailing this load of sugar into a still at Cecil. I don't know who really owned it. At the time I was at the Rossi farm, it was in 1931. There are several Rossies and I don't really know who it was. All I have seen was the name on the barn. I knew what farm I was on but I didn't know who owned it. Previous to the Antigo mix-up, I was charged in Oconto and also on a larceny charge in Minnesota.

Redirect Examination by Mr. Koelzer.

I saw Freeman once after the time I went up to the Cecil still. I met him on the road between my mother's place and New London. I talked to him. He told me that they were willing to pay us if we didn't turn that plant in at Antigo. I told him I didn't want nothing to do with it. We got that load of alcohod and we were satisfied. I also paid him a share of what he insisted on for the tip-off.
81 I gave Sid Freeman $50.00 the first time. The second time his wife was there and I gave him $50.00.

GEORGE McELROY, a Government witness, sworn, examined by Mr. Koelzer, testified:

I live in Hortonville in Outagamie County four and one-half miles from New London and know Egbert Mathewson and Herbert Schrader. I went with them to a farm four miles north of New London in April, 1933. These boys came to me and wanted to hire my truck saying there was a lot of alcohol they wanted to move. When I got out there was men enough to load a box car in five minutes. It was a little off the main road. I was not supposed to have gone in the yard but when I got there there was two men at the gate and they directed me to this yard and I wasn't in there five minutes when the truck was packed. The sideboards were about 20 inches high and the body is 7 foot eight inches wide and 12 feet long. There was three 1 gallon cans in a case and paper around them. This other gang drove in behind me and shut me off. Them other boys all disappeared and I was there. One man took me out of the truck into the house under a gun. This was Trambar. There were several others. The next man I met I didn't know, but afterwards learned it was Pete Bondie who had a scar. He held me under a gun for two hours. I was rounded there in the house. I forget it was six or seven men and all of them was armed with guns. They were held about two inches under my nose and they told me to say my prayers. I said if you fellows got brass enough to shoot, do it. But they didn't do it and I took a good beating out of it. All of them took a rap at me. I don't know as Tessin hit me. He was
82 there, but Pete Bondie took several. I saw Sam Wainer. He said You—— and called me several names, what are you doing out here. I says I don't know anything about it. I said I am in your mercy right now. He says "you're going to get ten years out of it. We ain't going to kill you." I said "that's up to you." I think Ed Rossi was there. I don't know what was going on outside. I think they used my truck. About two hours later, Bondie and Sam took me to New London and handed me over to the chief of police. He told me he would lock me up and did until morning. Police Officer Strain came in and says, What kind of devilment are you up to. He said I had better spill anything I knew and I said I didn't have anything to spill. I asked to use the phone and he denied me everything. In the morning,

Chief of Police Macklin came down and I hollered. He asked me what I was doing and I told him the whole case and he released me taking me up to the doctor first.

Cross-Examination by Mr. Leahy.

I am 48 years old. I have never been arrested on any state offense. I think this happened in April, 1933 two years ago. I don't remember anybody going out to the farm. There was a couple of boys from New London who went. It was between eight thirty and 9 o'clock. I wasn't supposed to commit burglary. All I was supposed to do was drive the truck and haul the products away. Before I had a chance to get the alcohol another car drove up. There was a fight between myself and other men in which I was beaten. The man who turned me over to the authorities was Sam Wainer. I never knew who lived in the house. I learned later it was Rossi. I mean Ed Rossi's father. Bondie who is not here held me at the point of a gun and I was turned over to Sam Wainer.

LEUELLIN LONGRIE, a Government witness, sworn, examined by Mr. Koelzer, testified:

I live in New London. I am 22 years old. I know Heinie, Louie and Sam Wainer. I am acquainted with their place of business and the stock yards. I took alcohol from other places in New London. I was about 14 or 15 years old. I took some alcohol from a Buick garage, the Rush's Service Station, back of it. At the time I took it out of the Buick garage, there was a truck load. There was a car parked outside. It was a truck. I saw alcohol on several occa-
83 sions. I saw it loaded in trucks. I saw Sam Wainer and the other men who are sitting here around there driving trucks and all that. I know Fuhrman. He goes by the name of Piccolo Pete. I have seen him a few times. I remember on one occasion in 1928 when I stole alcohol from the Buick Panel truck. They came and got it, all those men. We always hid our stuff. Trambar, Tessin, Ravey and Blink came and got it. I didn't see Heinie Wainer about that time. There was an occasion when I took some alcohol and Heinie Wainer came to see me about it. I took some back of Rush's Service Station, 100 odd gallons. He came up to my girl's

folks where I happened to be, and one of the buys that was with me getting the stuff went upstairs and the guy went upstairs and told me to come down. One of Wainer's men was standing at the door and he cracked me over the head with a billy club and put me in the car. Heinie Wainer was sitting there on the back seat, the seats flopped down and he was banging me up with a billy club. It wasn't just banging, it was socking and banging both, a couple of guys holding me on each side. I was in the middle and he was doing the banging. I told him I had the alcohol out of the city limits a ways, and we went out there and there was none there. They let me off.

Cross-Examination by Mr. Clifford.

I started to take alcohol when I was about 14 or 15 years old. These transactions referred to were in 1930 and 1931. In the first instance, I saw some of these truck drivers personally take back alcohol that we hid. I know that Heinie Wainer does not now live in New London. I know Heinie Wainer has stayed away. He had a house. He wasn't married then.

"Q. How long since you have seen Heinie Wainer in New London?

A. Possibly four years."

I was convicted of a crime and served time in the Green Bay Reformatory for three years. That was in June 1931.

Redirect Examination by Mr. Koelzer.

I was convicted of stealing three cases of beer. I ran
84 a still near Leeman, Wisconsin, 1928 or 1929. I never saw any of these defendants nor Sam Wainer there. I saw people, but do not know their names. I know Sid Freeman. He told me he was setting up stills. I went to a still located at Black Creek in 1930. I was away in 1932. I saw people take sugar in there. I didn't know the driver. I saw Buck Blink on the road, but I never seen him go in the joint. He would be some distance away.

FRANK LONGRIE, a Government witness, sworn, examined by Mr. Koelzer, testified:

I live in New London and have lived there 33 years and I am the father of Leuellin Longrie. I wasn't there when Heinie called at my place and wanted some stuff. It was the summer of 1933. About midnight my wife woke me up and told me there was a car in the driveway and I got up and went to the door on the front porch and Heinie was there and he asked me if the boys was home. He said tell Leuellin or Hunky that I want my stuff, so I got the boys up. They got something out and Heinie put in on his car and took it away. He came on one other occasion and he said he wanted some more stuff I told him if he was looking for the stuff he would have to call the boys. He drove in the yard and I told him if he was looking for stuff to go back out of the yard and get on the curbing and I would call the boys or have the boy go and talk to him about the stuff, there was no stuff in the yard. The boys went out and talked to him. I know Louis Wainer. He came to my house several times. I have seen Louis Wainer on business several times. Louis came once and said he was glad the stuff was returned and everything was fixed up because he never liked to have any trouble between them and me and I told him I was glad of it, too, because I didn't want that kind of stuff.

Cross-Examination by Mr. Clifford.

He said he was glad that the trouble was fixed up between Heinie and me. He did not admit that he had any part of it or anything to do with it in any way.

85 CLIFFORD SAWALL, a Government witness, sworn, examined by Mr. Koelzer, testified:

I live in New London. I am 22 years old. I have taken alcohol around new London more than once. I started when I was 16 and the other boys eatched the buildings back of Rush's Service Station or saloon in 1933 or 1932. There was a red van there. It backed up there and we laid behind the woodpile and they were unloading drums and we laid there quite a while and they went in the saloon after a drink

or something and me and Egbert Mathewson went in the building and then they come back. They got the truck unloaded and backed up to the other door and loaded up with cans. There was alcohol in the drums. I know I did not see Sam Wainer there. I heard him. Sam was arguing with somebody as to how long it would take to can 46 drums. In June, 1933, Leuellin Longrie and Dick Cartwright and I took alcohol from the Ford garage. We were over by the tombstone building, sitting there and Sam Wainer drove up. He shut the door, went over to the hotel, and about ten minutes later, Buck Blink drove in with an empty van and then Sam drove the load in about ten minutes later. He shut the door. We went in the back window and after we were there, we found that the door was open and we closed the front door and pulled the cans. We got 108 gallons off the truck. We put it in a boat and took it down the river. I know Heinie Wainer. I saw him shortly after. Egbert Mathewson and I put our share in the haystack in Rokoff's field and the next night we went down with the car and got it. Leuellin Longrie was with me and we took it from there to my sister's home, my share, and Leuellin Longrie and I put my share in the cold air chute in the furnace and his was in the fruit cupboard. We borrowed Foley's car one night and Heinie drove up behind us. He called Leuellin out of the car. I tried to follow them but I could not and I drove the car back to where they stopped us. They came back and Heinie says, Where is that stuff? I says, What stuff? He says, You know what I am talking about and I says, Mine must be in Milwaukee by this time. I told
86 him to look for it. I would tell him that the stuff was in Milwaukee and finally the guy in the back seat took a crack at me. They pounded me for quite a while and then I finally told him and we went back. I don't know who the other men were in the car. It was dark. I talked with Louis Wainer after the stuff was out of the house. I was standing next to the stuff and he said if I didn't cut it out, it wouldn't be very good for my health. At the time we took the steel drums of alcohol from Rush's place, we didn't have no way of hauling them. We put six of them in the vacant house at the corner. George Beatty had moved out of it.

Cross-Examination.

I live in New London and have since 1930. I did not live in Green Bay part of the time. I was never arrested out-

side of fishing. I never served time in Green Bay. It was in April 1932 that I hijacked the drums. It was shortly after that at Mrs. Louis Wainer's farm in 1932.

HAZEL HARRIS, a Government witness, sworn, examined by Mr. Koelzer, testified:

I live in New London and have lived there about 17 years and am a sister of Clifford Sawall. I lived there in 1932 and 1933. I have never seen him bringing any packages in the basement. All I knew was what he said about it. I knew Louis Wainer. They drove to my home one night. I heard two cars come down the street, and I heard some fellow say, "Louis, drive right in the driveway" and he drove in there and then they come in after the stuff. My brother and Uncle Longrie carried most of it out. I know Louis Wainer. He was the one that drove in the driveway. I know Heinie Wainer. He looked around the door when he got Leuellin's share out of the basement and he asked if my husband was home and I told him no. Clifford said he was going with them and then he was gone for an hour and a half and then they came back and got his share. Louis went out and came back in and said there is so many cans missing and my brother had three more cans there and he give them to Louis and Louis took them out. I noticed my brother's face was pretty bruised up when he came back.

Cross-Examination by Mr. Clifford.

87 It must have been five or six years ago. All I remember was what was said around. It happened about 8:30 but before I had gone to bed. I did not get out of the house. I had no talk with Heinie. Louis had a conversation with us in the kitchen. Louis said he didn't think it would be good for Clifford's health if he kept on doing what he was doing. There was one Wainer in the house. Heinie looked around the door when he got Leuleein's share. It wasn't Sam that was there rather than Louis. The first time was earlier than 8:30 and the last time was about 8:00 or 8:30. I just saw Heinie. Louis didn't do anything out of the way. He just said that was all and took the last three cans and carried them out of the house. They were stored in the cold air chute.

FRANK ROWDEN, a witness called on behalf of the Government, sworn, examined by Mr. Koelzer, testified:

I live in New London and have since 1919. I am a laborer by occupation. From July 1929 to September 1931 I was employed at the Buick garage in New London. I was not employed in 1932. I was expected to wait on customers at the Buick garage, sell gas, light repair work, fix tires, take care of the shop at night. I know these defendants, Sam, Louis, Ravey, Blink, Rossi, Davis, all except two or three. I couldn't say that any of these men stored cars there. They would bring cars in and leave them. They would store cars. When they came in the cars were loaded. There never was a load that wasn't covered. That's why I didn't know what it was. The cars were usually locked. There was some drums on some of them. I don't think any man brought in cars with drums on. They were all strangers. I saw some of these men at the garage. The cars would come in there and they would come and get the cars and take them away, and after a while they would bring them back. Maybe the same man would bring them back; maybe somebody else would bring them back. Usually they would come back loaded. They would give me the keys and say "put these keys in the office for when the owner comes give him his keys." I could not tell where they were from except from the license plates. Some were from Illinois, some Wisconsin and some Minnesota and some Dakota. I don't know what was done in the daytime. I was there only at night. Ravey brought
88 some trucks back and also Davis. Sam Wainer and Earl Blink have brought them in. I know Fuhrman. I have seen him around there. He seemed to be helping. Sometimes mechanical work was charged to Heinie Wainer. Sometimes it was charged to a trucking company. It was the Northwest Trucking Company. I never saw it being paid for. It never was paid me. It was charged out. I know Pete Bondie. He seemed to be more or less in charge at different times telling the follows what to do. I know Rossi and Trambar and have seen them there. Rossi didn't seem to be doing much. He would come in and get a little work done on his car, give cash and go out. Trambar would come in with a loaded car, but never often. I do not know Howard Siats, but I did know a fellow called Doc. He drove a car in there, but he never seemed to have much. He would

bring it in and get a little mechanical work done and go away again. I don't know Adoph Siebold. I know Tessin. He would come in with empty cars and sometimes take a car away. I know Ted Wallmer. He would be around occasionally. I don't know Charley Christenson.

Cross-Examination by Mr. Clifford.

As far as Wallmer is concerned, I know he ran a dance hall and restaurant north of New London. I never saw Ted Tallmer have anything to do with it at all. He had a public garage. There were two or three in New London. This is a fairly good sized garage. Many of these people came to get gas and oil and get their work done. I saw Sam Wainer there. Louis would come in there to have a little work done on his car or something of that sort. I don't recall that he was ever there with a truck or in any way having anything to do with a load of alcohol. My connection there as night man was from the second week in July 1929 to the first week in September, 1931. I don't think I ever saw Heinie Wainer with reference to any load of alcohol or loaded truck. I don't know whether this Doc was connected in any way. What work he had done, he paid for as his own as far as I know. I personally made charges for the storage. Storage was paid by the owner as the cars were taken out. If there
89 was an Illinois truck came and left over night, he would pay for it. I don't recall any Iowa truck. When trucks were taken out when I was on duty they paid their bill. I had seen Irv Dorschner around the garage. We didn't approve of people around, but if they had business, we took care of the business. I had orders not to let them hang around. Ravey operated a truck. I don't recall just when. Either in 1929 or 1930. I don't recall on what occasion. Shorty Davis came in there. It was a truck with drums on it. I don't know whether it was 1929 or 1930. Pete Bondie seemed to be in charge of the trucks. Because he would tell the fellows what places to go and different things. He told me what to do in my capacity as attendant at the garage. If somebody would come and wanted work done or air or gas I took their instructions. That is the drivers, when they would come in, but nobody else.

Redirect Examination by Mr. Koelzer.

Dorschner was helping other fellows who would come in with trucks. Perhaps there would be two in a car and he would. There might be one of these fellows. One night, I saw a truck broken down and changed some cans.

EDWIN SAUNDERS, a Government witness, sworn, examined by Mr. Koelzer, testified:

I live in Clintonville. I know Judson Boulac who lives in Clintonville and is engaged in the business of handling alcohol and I made trips with him in 1932 and 1933. I went as far as Menominee Falls. I went to New London for the purpose of getting alcohol and got it at the Ford garage. I met a fellow by the name of Stub. Shorty Davis and Wallmer. I think it was Ted Wallmer. Sometimes Heinie Wainer would be there in the office. That is all I recall just now. We would leave our car outside and some fellow would take it into the garage and load it up. Sometimes the driver would take it away and bring them back. They would be loaded. Mr. Boulac did all the business. I saw Heinie Wainer there. I recall a couple of times Boulac talked to him. I know Earl Blink by face. I have seen Wainer and Davis there. Davis drove our car. I thought Wallmer was a bookkeeper around there. I made a couple of my payments to a fellow by the name of Stub and Sam Weiner. I saw Boulac make a couple of payments to this Stub or Shorty Davis. I was pretty sure there was some conversation with Heinie Wainer on price. Heinie called him a chiseler. He always wanted to get the stuff a little cheaper.

Cross-Examination by Mr. Leahy.

I am a sign painter. After we were loaded we would leave New London. I never lived in New London. I lived in Waupaca County 18 or 19 years. I went to work for Boulac in 1932. He was in the brewery business in Clintonville, but did not handle alcohol at that time. He never entered it as a big business. He entered the alcohol business in 1932 or 1933. I was not a partner. I just drove him around the country. We transported alcohol in New London 7 or 8 times. I think it was in 1932 just on a small scale getting alcohol once in

a while. The first time we went to the Elwood Hotel. I saw Wallmer and I think he was the bookkeeper. Boulac would do the talking. I don't think I talked to anybody. I was just the driver. Once I talked to Stub at the Ford Garage. Boulac also talked to Stub. I talked to Wallmer but nothing about alcohol. I talked to Sam Wainer about alcohol on my fifth visit. Boulac was with me at that time. There are two Boulacs; Merle Boulac is the son. I talked to Hoffman. Not any of these defendants did I talk to on the sixth time I was there, as I recall. I talked to Sam Weiner relative to alcohol on my seventh visit. I do not see Stub here.

Redirect Examination by Mr. Koelzer.

I don't know the name of this man Stub. I think this Hoffmann is dead.

JUDSON BOULAC, a witness called on behalf of the Government, sworn, examined by Mr. Koelzer, testified:

I live in Clintonville and was in the beer business in 1926 and 1928. I sold beer to the Wainers. I discontinued it in May, 1929. I started after I got back from the House of Correction where I had been sentenced for making home brew. In 1926 I bought beer from the Schoener Brewing Company. Later I met a couple of big shots, federal guys from Green Bay, Strong and Finke, so we talked with Strong and I said we are in the beer business and he says, Why don't you put up a plant. I said it would be very nice
91 if I could because I need. My wife was quite sick. I went down to Chicago to see my wife and came back and put up a plant and Strong said, If you pay so much a month. I know that these men were convicted in this Court of accepting bribes. I bought beer from Wainers in 1930 and some alcohol from them. In 1930 and 1931 I was sick and had a few men working for me. I would deal with Sam Wainer and a fellow by the name of Stub. I heard Stub is dead. Once in a while a fellow at Clintonville wanted a little stuff so I would go down to New London and I would deal with Sam or Stub or the bookkeeper. I think they called him Joe. Lots of times it was in that little place on the left hand side where I used to go and then they changed and had their office in a garage. I would see Ted Wallmer but

I thought he was only a bookkeeper. Most of the dealings I had were with Sam Wainer. I never had any transactions that I remember with Heinie Wainer. I went to him sometimes and asked him about the price. He says you always go to the boys because I have nothing to say on that. A lot of times I went to him. He meant the boys that was working. I went to Sammie and Stub. I know Ed Rossi and have seen him around. I don't know what he was doing. I think he was in the beer game. Sometimes we would get from 5 to 100 gallons of alcohol a trip. I paid them the money and they took the car and loaded it, brought it back and most of the payments I made to Stub and Sam Wainer and a fellow by the name of Joe and Earl Blink. Joe was the little fellow. I don't know his last name. I do not remember if I ever paid Wallmer. A very few times I dealt with Wallmer. If I did, he would say I will take the money for Stub or for the bookkeeper.

Cross-Examination by Mr. Leahy.

I went to the House of Correction in May 15, 1929. After I came back, I started in the beer business again in 1931 and continued up to the time good beer came back. I claim that the reason I built this brewery was because federal agents induced me to build it.

MORRIS GORDON, a Government witness, sworn, examined by Mr. Koelzer, testified:

I am an accountant and was in the trucking business between 1931 and 1933 at West Pier Street, Milwaukee. I had my trucks up to Fond du Lac.

92 I don't know about the DuFresne warehouse. My trucks did not do any hauling at the time. I took one truck up there and I hired another man with another truck. My truck got up there too late, and my truck was standing on the street doing nothing and the other truck did all the work. I don't know what the other truck was doing. I wasn't at the warehouse at all. I was hired to do the job by a certain Mr. Jackson. I have never seen him since. From the picture in the papers, I assume it was Pete Bondie. I recognize that picture as Mr. Jackson. At the time he hired me, I was having a little trouble with my help. I was break-

ing in some new help at the time and I rode with my new help. It happened on Saturday night. I got in from a job about 11:00 o'clock at night. My wife said somebody called me but he didn't want to leave his name, but he said he would call back in about 15 minutes. He called then and said he would like to see me right away. The door bell rang and a young man came up and said he was Jackson. He said he wanted some moving done in Fond du Lac. We dickered about the price and arranged for three or four trucks saying I could get him at the Retlaw Hotel. I had one truck that was available so I hired another man to go along with my truck and help out. Monday night my trucks were tied up and I was not able to make it so I called Jackson at the hotel and told him I was delayed. He said to make it the next night at the same time. The next day I didn't get in until 7 o'clock and in the meantime the truck I hired had left for Fond du Lac and I got there about 10:00 o'clock. He didn't happen to be at the hotel. When he came he said he didn't need my truck but he could use a few men I had waiting. The other truck did do hauling. Afterwards I learned that they had hauled government property that had been seized.

Cross-Examination by Mr. Clifford.

I live in Milwaukee and I am not still in the trucking business. I had this first meeting with Jackson in April, 1933. He said he needed a couple of trucks that would take four or five loads and a lot of men. There was no intention
93 on my part to violate the law. There was a delay of one day because of the trucks. I planned on sending two trucks and one was mine and one I hired. This truck was one I hired from a man by the name of Grove from Milwaukee. He kept his truck in my garage. We got there too late. What they did, I had no knowledge of at all. I was paid for running my trucks and for the work of Grover's truck. My truck didn't do anything but the men worked. I saw Grove's men and my own men there but I did not see any of these defendants at all.

ELMER GETTMANN, a Government witness, sworn, examined by Mr. Koelzer, testified:

I am investigator of the Alcohol Tax Division, Bureau of Internal Revenue. On the 4th day of April, 1934, I visited some premises on the outskirts of New London for the purpose of making a search. It was a brick farm residence outside of the city of New London which I was informed was the residence of Louis Wainer. I entered the house and knocked at the rear door. Edna Hilker came to the door. She said Louis Wainer lived there and I asked her if she was a member of the family and she said no, she was a domestic servant. I asked her how long she had worked for Wainer and she said since September, 1933, and that they had just moved to this residence and were getting settled. I informed her that I was a federal officer and had a search warrant. I told her I wanted to see Wainer and she called several places trying to locate him but she could not contact him. We waited for ¾ of an hour before we made any search at all, expecting her to contact Mr. Wainer. She was rather frightened but finally she gained confidence and I told
94 her that we would complete our search. I saw Inspector Empey find a quantity of liquor in the clothes closet. There was a lot of clothing hanging in the closet. I asked Miss Hilker whose clothing that was and she said it belonged to Louis Wainer. There was a traveling bag packed with wearing apparel and she said that was Louis Wainer's personal bag. I saw an index of 150 names of people. There was a 50 gallon drum which contained glycerin. I found a number of new corks. There were 169 cases contain 2 three gallon glass jugs, labeled Blatz Brewing Company. There was a pipe laid from the basement of the house to the pump house outside of the house. In there was a boiler and tank with a coil in the bottom. This tank would hold approximately 1000 gallons. It is the kind of a tank we find in cutting plants used to heat the liquor while it is being blended and mixed. By cutting plant I mean rectifying plant. In the barn there were about two hundred empty 50 gallon barrels which smelled of recently having contained alcohol; also 40 gallon drums, some empty alcohol tins and numerous other things. In the house we found rye flavoring, glycerin. I tried to locate Wainer for a couple of days around town. I never could get in contact with him. There were 3 copper

lined tanks in the basement and another heating or cooling coil that could be used for either purpose. The capacity was 2 or 300 gallons. I was informed that the property belonged to Ted Wallmer. I went out and interviewed Mr. Wallmer a couple of times and finally located him. He said that his wife handled the renting of the property. I asked him if he owned the property and he told me he did but Louis Wainer was living there now, but he didn't know how long. These are samples of liquor that I took there that day. There is alcohol in gallon cans, rye residue, Old Hermitage whiskey, Old Cutter whiskey, University Club, Golden Wedding, Old Harper, Liquer D'Acey, pre-war whiskey, some martini, Huntley Scotch, Rock Cove whiskey. Most of the full bottles had stamps on.

Cross-Examination by Mr. Clifford.

I can not testify that most of these bottles contain
95 lawfully distilled whiskey. I thought it was counterfeit. The stamps looked peculiar to me, some of them. I am not a good judge of whiskey. I seized it on a suspicion that it was not lawfully distilled whiskey. Some of the stamps did not have as good printing as the government stamps. There are stamps on the bottles. I can't tell by examining the stamps whether they are lawful stamps. I was informed by the domestic that Mrs. Wainer had moved part of the stuff in four days previous. I know that night of April 3. I was hovering in that vicinity with the other agents and a truck or car came into the yard and I heard it back or turn around. It was foggy. I asked the domestic to explain that car the next day and she said that a cattle truck had come in there and loaded up some stuff. I found the remains of a broken two gallon jug. You could smell whiskey on the ground. I had this house under observation three or four days. I saw Louis Wainer's car parked out there for the first time on April 3. I did not see Louis Wainer at any time. He wasn't there when this raid was made. I was informed that Mrs. Wainer had moved part of the furniture four days before. I would say none of this stuff was moved in there after Mrs. Wainer had moved the furniture. I had been sent up to ascertain whether the Wainers were engaged in the illicit traffic in liquor and make a report. The barn was locked. It was to the rear of the residence. There were some barrels and drums and wrapping paper and twine, empty alcohol cans and vari-

ous articles of that kind in the barn. There was nothing in the barn that I could identify as personal effects of Louis Wainer. I went to the Register of Deeds and found that the records showed Louis Wainer was not the owner of the property, but Wallmer paid the taxes. In the talk that I had with Mrs. Wallmer, she didn't know whether Mrs. Wainer had moved in or not. She had made arrangements to move for a couple of weeks and possession was to take place the first of April. These arrangements were made with Mrs. Louis Wainer. I looked for Louis around town. Runthamer or something like that, a bookkeeper at the Wainer garage, told me that Louis had been around town but he was always out when I came there.

96 I didn't know Louis Wainer at the time. I wouldn't have known him if I had seen him. I didn't see anybody that I now recognize as Louis Wainer at that time.

97 JOHN W. FONNER, a Government witness, sworn, examined by Mr. Koelzer, testified:

I am a chemist in the Bureau of Internal Revenue; have been for sixteen years. My duties consist of analyzing alcoholic liquors. I have been stationed in Chicago since December, 1920. I have analyzed all the samples on the table. I found that some of them were not genuine whiskey; they were cut—mixed with alcohol and artificial coloring. Some were good whiskeys To me, as a chemist, the finding of good whiskey, of genuine whiskey and whiskey that had been cut would mean that they used the good whiskey to flavor up alcohol and make more whiskey. About twenty-five per cent of this whiskey was cut whiskey.

Cross-Examination by Mr. Clifford.

The balance was good whiskey with the exception of two cans of alcohol, and there was also a bottle of glycerin and rye flavoring.

FRANKLIN MILLER, a witness on behalf of the Government, sworn, examined by Mr. Koelzer, testified:

My name is "Dutch" Miller. I live in New London, have lived there twenty-eight years. I was employed by Joe Hoffman, who was a bookkeeper for Louis Wainer. I worked on his farm and I was driving a truck for him. He hired me about 1931. I worked as a bottle washer in Louis Wainer's barn on Waupaca Street. I was paid eighteen dollars a week. My duties were to drive truck and wash bottles. I worked there about eight months. I hauled empty cartons and alcohol cans and empty beer kegs. I had nothing to do with filling the kegs. That was during 1932. The truck was an open Chevrolet truck. I drove a truck with the name "Triangle Products Company" on it, for the same purpose. I would get those cans there in the shed over at the stock yards. It was not back of the Rush Filling Station. I hauled empty cartons from near the Rush Filling Station, took them to a brick house north of New London. Nobody was living there at that time. I do not know what place it was. I know Al Tassen. He worked with me washing bottles, but not carting that I know of. Joe Hoffman always paid me. He left it in an envelope in the desk. This was in Wainer's
98 cattle office. I saw Louis Wainer there at the desk, and talked to some farmers. Whenever money was handed to me, Joe Hoffman handed it to me. If it was not there, it was in a desk or in a drawer. I could help myself. I saw Heinie Wainer there very seldom, only once or twice. He never talked to the men, nothing out of the ordinary. I never heard the conversation and do not know what they were talking about. I saw a few strangers' cars come there, some from Dakota and Illinois. I knew Stub Wyman. I can't say that he would take care of the truck that came to the garage. He would take a car now and then, drive it away and then come back, when it would look a little heavier. I don't know if it was loaded. I once heard Heinie say to Stub, "I guess you can go to work." Stub went outside, got a car and drove away and brought— I know Trambar, but I don't know Buck Blink so well. I know Ravey, Lasse, Tessen, Wallmer and Rossey and have seen these men around this place. They stopped there for a visit and would sit down and play cards during the day. I would only see them drive their own cars.

Cross-Examination by Mr. Clifford.

I am working now for the New London Produce Company, F. J. LaMarch, have been for two years. New London is my home. I know Sam Wainer, but not so well. Hoffman hired me, paid me, gave me my directions. Louis Wainer never gave me any directions, had nothing to do with fixing my employment. Hoffman told me about washing the bottles. There was never any alcohol on Louis Wainer's farm that I saw. The farm is a big 120 acre farm, operated to the fullest extent and Mr. Wainer was in the cattle business in addition to the operating of the farm. I did not help him in the buying or selling of cattle or in the operation of the farm. The only thing I did was what Hoffman told me. At the Wainer office they had an old fur and cattle business. Conducted there with a sign on it for about twenty years. Just a small frame building. I never heard of Louis Wainer any time I was there transact any business with reference to alcohol or beer. I know that Hoffman did some work with Louis Wainer with reference to keeping the cattle account and some work
99 with reference to the rest of the family for their transactions. The work was divided. He was working for two different parties. The farmers came there for the buying and selling of their cattle. I knew Sutb Wyman. He never worked for Louis Wainer that I know of Trambar, Ravey, Rossey, Wallmer never worked for Louis Wainer that I know of. I never heard Louis Wainer give anyone of these instructions with reference to beer or alcohol. Some strange cars would drive up to the office. They would not get in touch with me. I handled no alcohol transactions. The only thing I did was wash a few beer bottles. I know that Heinie had not lived in New London for several years and until recently was an unmarried man. Wyman was an automobile mechanic and took various trucks over to his garage and made repairs on them. I don't know where Wyman took the truck when he drove away.

Redirect Examination by Mr. Koelzer.

Sometimes we would wash fifty or sixty cases of beer bottles a day at the Louis Wainer place. I don't know where Wyman took the truck when he left. I don't know if he was repairing it. He was a garage man by trade. I can't say that he repaired it every time.

Recross Examination by Mr. Clifford.

The shack I referred to is not on Louis Wainer's farm. Louis Wainer's farm is a mile and a half from New London. I got these cartons out of the sheds located behind the Grand Theatre at New London. It had no connection with Louis Wainer's farm. I never washed any beer bottles for Louis Wainer.

Redirect Examination by Mr. Koelzer.

Louis Wainer lived in a house there. There was a barn to the rear of the house. I was washing bottles for Joe Hoffman, who was a bookkeeper. This was Hoffman's business as far as I know. I had not talked to Hoffman about it. I was at it eight months. I don't know whether the bottles were for beer or ale or who for.

100 *Recross Examination by Mr. Clifford.*

This barn was not a barn used in connection with the operation of the farm. It is located a mile and a half from the farm.

Redirect Examination by Mr. Koelzer.

Hoffman was bookkeeper in the office Louis Wainer was connected with.

AUGUST BECKER, a witness on behalf of the Government, sworn, examined by Mr. Koelzer, testified:

Direct Examination by Mr. Koelzer.

This was one of the defendants that filed a plea of guilty and desires to take the stand.

By the Court: I am one of the defendants. I pleaded guilty and understand the situation fully and am willing to testify fully and unreservedly.

By Mr. Koelzer: I lived in New London for twenty-four years. I was employed by Joe Hoffman. He is now dead. I worked in the beer, dug ditch out on the Herman Bauer farm. Hoffman paid me and gave me most of my orders and Sam Wainer gave me some. Heinie instructed me once or

twice. He told me what test he wanted the alcohol at. I was working at the canning joint for a couple of weeks. Heinie told me what proof he wanted. You could not raise it, but you could reduce it with distilled water. All he ever asked me about beer was how the tanks were. If they were clean. Told me to get some work from the Knapstein Brewery. I saw Blink with a load of beer. I drove a truck on several occasions, but made no deliveries. The brewery was three miles out of New London on a farm. I never hauled any alcohol any further than from the canning joint to New London. It was a vacant house and what I knew it as at that time was as the brick house. There was nobody living in it. I think Louis Wainer lives there now, or, rather, used to live there. Don't know who lives there now. I don't know Ted Wallmer owns it. It is north of town. I went with Williams to the Longrie home to get some alcohol that was stolen.
101 He assumed Longrie took it. Heinie Wainer out at Ted's asked me if I knew of some alcohol that was hijacked and I told him no.

Cross-Examination by Mr. Leahy.

I first worked for Hoffman in the spring of 1930. I knew him when he lived in Hortonville. Met him at a dance. I don't say I associated with him, I just saw him. I went to work in the spring of 1930, at the brewery on the Bauer farm. I did not live on the farm, but lived in the city of New London. Jim and Al worked there. Blink hauled some wort down one night. He never really worked there any period of time. He merely drove a truck out. I know both the Blink boys. I think it was Earl that drove the car. None of these other defendants ever worked in the brewery that I know of.

Redirect Examination by Mr. Koelzer.

I was not there when McElroy was beaten up. I know the farm which is north of New London.

FLOYD GRANDER, a witness on behalf of the Government, sworn, examined by Mr. Koelzer, testified:

(This witness also entered a plea of guilty.)

By the Court: I am a defendant, pleaded guilty and desire to take the stand. I understand the situation fully. I live in New London and have for a number of years been engaged in the business of hauling corn sugar. I started the latter part of 1932, and went on the pay about April, 1933. I was paid by the hundred pounds of sugar hauled. My pay came from different people. Don Ram one time, and a guy by the name of Howard Siats, known as "Doc". Never heard him referred to as Jow Howard. Heard him referred to as just Howard, and Bud Hopp, who would hand me the envelopes. Sugar would be shipped on the tracks and delivered for the tracks at New London, Appleton, Butler and Milwaukee. I would take it direct to the stills. The stills were located at the Litman farm in Shawano County near Cecils and the Perky farm near Hollister, and in the Graff building in Appleton. The different stills varied in quantities hauled. The Appleton still was supposed to have an intake of 102 2750 bags of corn sugar a week. We did not come up to that standard, but it was somewhere in that neighborhood. They were 100 lb. bags, which would be 27,000 lbs. a week. I hauled some lumber to these stills. I met Sid Freemen, who was supposed to be a plumber or set-up man. I saw him working around these stills. I never helped load any alcohol. I knew Pete Bondie, have seen Buck Blink at these stills transporting with trucks. I did not help them guard the still or see them acting as guards. I saw Earl and Buck Blink while the still was in operation. Howard Siats paid me but not until Don Ram died. The dealings done through Ram went mostly to Howard. I think the Howard dealings started with me in 1933, outside of just verbal conversations at times. Once in Milwaukee we had sugar trouble. It was costing us a lot of money to come down here and lay around arguing and fighting. Doc said "Just a minute, Boss H is downstairs and I will put him on the wire with you." We knew "The Boss H" was Heinie. He was on the line informing me he would see to it. I was to go to the terminal. That was the second time we had sugar troubles. At that time I told him, I thought I could probably make negotiations so we would not lose a lot of money laying around in Milwau-

kee for sugar delivery. I was sent down to the terminal, which I took care of and made proper contact with the authorities. I then got the sugar. I saw Sam Wainer after Pete Bondie was released from Milwaukee, after he had been on trial here. Bondie came home. His mind was supposed to be deranged. He acted very queer. Sam said I was the only one he could send up to take care of him and I was sent up there and his brother-in-law was there and fought with the man all night when he had those spells and held him down. I was sent there by Sam Wainer and watched him every minute all that night until morning. I never got a dime. The still in Appleton was running about three months in the spring of 1933. It was discontinued because the smell was getting across the valley and they were afraid of a check-up. I was hauling sugar under freight rates.

Cross-Examination by Mr. Clifford.

I live in New London and am in the trucking business and own my own truck. Did a general trucking business hauling sugar and other articles for a number of people. I was
103 not in a position to know the owner of these stills. I only know as my boss that was giving me my orders told me who the boss was. I rather think one of the stills in Appleton was owned by the Wainer's, but am not positive. It was located in the old Graff Toy Works, in the valley down by the paper mills, on the Fox River. It ran for about three months. Heinie Wainer at that plant gave me instructions only as to corn sugar. I was hauling sugar to that particular plant, but not to the different plants at the same time. Started to haul in 1932 and was up at Cecil, then to the Perkey still. I do not know who the owner of that was. The original contract for hauling was with Don Ram. He was a business man in New London, dealt in hardware and went from that to the coal business. He handled or shedded some sugar for the syndicate, or whoever they were at that time. Ram had two businesses, one hauling corn sugar and the other coal business. He always went somewhere else before he gave me orders. I don't know that he was in the business of buying or selling corn sugar. He was a go-between somewhere, but I am not positive. My original transaction was with Ram and Siats. I couldn't state whether one was owner and one was seller. Siats paid me for hauling for him. At times Ram paid me for hauling. Sometimes the man at the stills. None

of these defendants ever paid me. I never saw any of these defendants actually operating the still. I saw Blink who was at the stills. Either with a loaded truck or an empty truck. There was nobody on the truck that I remember. That was at the Litman and Appleton still. Bud Hopp seemed to have some authority. He was a go-between. He always worked with somebody else. Just a little higher up than the ordinary working man. Hopp was the only one that gave instructions besides Siats and Ram. First met Doc Siats in October or November 1932. I never trucked any alcohol. I trucked sugar. I made one other trucking trip from the Dale sidetrack to New London and it was sugar stored in the Ram shed. He had a building they stored sugar in. The cars would come in labelled, "Ram Fuel Company," "E. R. Ram," or "D. H. Ham." They were loaded down at the warehouse.

We had nothing to do with them. If we loaded them di-
104 rectly from the car they were unloaded directly at his sidetracks or on some sidetracks along in New London. I never saw Heinie Wainer at any plant or personally in connection with any sugar.

Redirect Examination by Mr. Koelzer.

Ram is dead. He died late in 1932 or early part of 1933. He was sick for some time. Heinie Wainer arranged for me to get corn sugar that was going to the Appleton still. I never had any dealings with alcohol with Heinie Wainer. After I was let out of the last still, I had no way to make payments. I was promised when I went in with the truck that if I got too much heat on me I was not going to be any good for corn sugar hauling, I would be seen through so I would not lose the equipment that I had invested in, to protect them in their trucking and I went to him and asked him for some help and he said, "Well, I will see you. I can't do nothing for you right now; there is nothing I can work with you but I will help you out," and I am still waiting. There was something said about the price, but there was no chiseling as far as corn sugar was concerned. We had some argument on the price in regard to some beer hauling from Green Bay to Stevens Point. My price was too high; he couldn't take it. Mr. Wainer told me it was too high.

Recross Examination by Mr. Clifford.

My idea of what I pleaded guilty for was as to the handling of the corn sugar and the hauling. I can't give the exact date but the last sugar I hauled was either in the last of March or the first part of April 1933.

LANE MALONEY, a Government witness sworn, examined by Mr. Koelzer, testified:

I am an investigator in charge of the alcohol tax for the collective district of Wisconsin, have been with the Internal Revenue and Department of Justice for eighteen years. Exhibits 1 and 2 are pictures of a man known to me as Howard Siats and Doctor Howard Siats and "Doc" and Joe Howard. I know that from personal conversation with him, having arrested him twice and known him for over six years, and his response "Yes" over the telephone to the question "Is this Joe Howard?"

105 HARRY MACKLIN, a witness on behalf of the Government sworn, examined by Mr. Koelzer, testified:

I am Chief of Police in New London, have been since May, 1931. I know Heinie Wainer and these other men, except two. I know Ted Wallmer, George Davis, Blink, Ravey, Christenson, Trambar, Heinie Wainer, Edward Dorschner, Al Tessen and Ed Rossey. I seized a car with alcohol on it the 21st of July, 1931. I stopped at the arterial coming from the west on Lincoln Avenue and noticed a truck, a Buick truck with pleasure car plates on it. I followed the truck through on some of the side streets and stopped them up in the south end of town and investigation showed the truck contained gallon tins of alcohol. There were 287 gallons that I counted. The driver's name was Raymond John VandeHyde. I know Henry Wainer. Some time after the seizure summons was served on both Heinie and Louis Wainer. I couldn't find Louis. I inquired at the Elwood Hotel as to where Heinie was and the clerk said that he was around and he would try to get him. I waited down in the lobby and Heinie came down and I served the summons on him. He started to talk with me and wanted to know if I was going to continue bothering him, and said if I was he

would take their business out of town, to Kaukauna, Appleton, Fond du Lac, Oshkosh or Green Bay; that they were bringing a lot of money into New London and a lot of business. I know George McElroy and recall the occasion when he was lodged in jail. I released him in the morning, took him to a doctor and called the sheriff's office in Appleton to find if any charges were made against him. He was bruised up. I took part in the seizure at the home of Ted Wallmer. There was a number of drums of alcohol and a lot of cases of bottled liquor. Ted Wallmer wasn't there at the time of the seizure. He came in afterwards. That was his home.

Cross-Examination by Mr. Clifford.

I think there was a search warrant for the arrest of Ted Wallmer and we searched the house of Ted Wallmer and discovered the alcohol and whiskey.

106 RAY EMPEY, a Government witness, sworn, examined by Mr. Koelzer, testified:

I am an officer of the Internal Revenue, have been since 1929. I know the defendant Heinie Wainer, met him two or three times; first in Wausau, met him in front of the court house. Talked with him in reference to his installing a distillery in Oneida County in the vicinity of Rhinelander, in 1930. I received a phone call at my home from a man claiming to be Heinie Wainer, wanting to know if he could talk to me. I told him that he could and asked him where he wanted to meet me, and he said, "Anywhere you say." So I told him to meet me at the commissioner's office, when I happened to remember that this was Saturday and the commissioner's office would not be open, so I told him to meet me in front of the court house about 1:30. He met me there and said, "I have heard that you are in charge of prohibition enforcement up in this section of the state, at Rhinelander and in Oneida County," and I said, "That is right. Why?" He said, "I want to put in a plant up near Rhinelander. If you keep away from it for a year, I will make it well worth your time." I replied, "We don't do business that way over here." He said, "Well, it's a feather in your hat every time you knock off a big outfit, isn't it?" And he said, "I will move in unbeknown to you and after I have operated six months I will take you

out and show you where it is and leave you knock it off." I said, "No, we won't do that either. I hope that you move in. If you do, I will guarantee that we will knock you off in less than six months." To which he replied, "Well, I better stay where I am." I talked to him on another occasion and he said he would come up to the house. I don't recall what time that was. Instead of remaining home I took the family and we went out riding. I went down to the neighborhood store and they told me there was a man there looking for me, driving a Pierce Arrow car. I asked them to describe the man and they did, and the description fitted Wainer. A short time afterwards I received a phone call from Wainer saying he would come up. He came up to my place and parked in front of the house. He was driving a Pierce Arrow. We talked for a
107 few minutes and he said, "You don't have to be afraid; it isn't the big fellow that does any talking; it is only the small fellow that squawks." I said, "If that is what you came up to see me about, our conversation is at an end," and I went back in the house. I met him once after that in Rhinelander. He was there with two or three other fellows and I was there with three other federal agents. He said "Hello." I met him again at the time he was sentenced, I think it was at LaCrosse, when he was fined $2000 and his men were fined $250 each. I walked up to him and said, "Heinie, you got away pretty easy." He said, "Two grand is a lot of dough." And I said, "Yes, two grand is a lot of dough but it is a whole lot better than going to jail." And he said to me, "Just remember this, some day you will say to yourself 'what a fool I was for not listening to Heinie Wainer'," and I said, "Maybe I will, Heinie, but I am satisfied with the way things are going." That is the last time I talked to him.

Cross-Examination by Mr. Clifford.

That last talk was in the Marshall's office when he was in the process of being fingerprinted. I don't think he talked so loud that anybody could hear him. I considered the proposition he was making me was offering me a bribe. I reported it to the Deputy Administrator, Ray J. Nye. I don't think he was kidding me. I never met the man before in my life. He called at my home. I live in Wausau. I met him in front of the court house. Out of a clear sky he made me the proposition to let me have him operate a still in Rhinelander County and he would make it worth while, that after he had operated

it six months he would show me where it was and let me knock it off. He didn't say that I would arrest him, he said, "I will take you out and show you where it is and leave you knock it off." I don't think I came over to the Wainer office in New London the first time I met him. I remember being over at New London with former prohibition agent Robert Zewicke on an investigation, but I do not recall that we saw
108 Wainer at that time. We may have, but I don't recall whether it was before or after. I don't recall seeing Wainer there. I didn't know who Wainer was in Wausau. I had heard of him. I was out with Zewicke to Wainer's place in New London. I don't recall seeing Heinie there. Whether I saw him there or not, I don't know. I didn't go in the back room with him in that office.

HOMER A. GODDARD, a Government witness, sworn, examined by Mr. Koelzer, testified:

I am a special investigator, Alcohol Tax Unit, Internal Revenue, and I know the defendant Al Tessen. I met him the 4th day of May, 1934, when he gave me a statement signed by him in the presence of myself and two other investigators.

"Milwaukee, Wisconsin, May 4, 1934.

State of Wisconsin }
County of Milwaukee } ss.

I, ALFRED C. TESSEN, on oath deposes and say:

I live at Fremont, Wisconsin, R. F. D. #1; am 35 years old, and know that I am giving this statement to Federal Officers H. C. Beaudrie and H. A. Goddard. I understand my constitutional rights; they advised me of them. I went to work for Heinie Wainer; he employed me at New London, Wisconsin, in the cattle office, in September, 1930. I understood that my duties would consist of handling illicit liquors; he promised me $35.00 per week. My first job was to haul 500 gallons of alcohol (in one gallon cans) from New London, Wisconsin, to Galesburg, Illinois, to the home of Dave Wainer. Sam Wainer accompanied me on this trip. Dave Wainer drove a convoy auto. My next trip was a few days later. Sam Wainer and I again hauled a similar load to Galesburg, Illinois. We averaged two trips per week until February, 1931, at which time

I started a saloon at Weyauwega, Wisconsin, which I operated until April, 1931, buying my liquors and beer from Heinie Wainer and his men, some of whom were Merle Ravey, Ethelmer Fuhrman, Ed Rossey, Joe Hoffman, all of whom made deliveries to me.

In April, 1931, I went back to work for Heinie Wainer at $30.00 per week. My duties then consisted of making beer
109 on the Herman Bauer Farm, near New London, on the Stevensville Road. I delivered most of this beer (in kegs and cases), sometimes aided by Merle Ravey, Kenneth Whitney, George Zitsky, Ed. Rossey. During the summer of 1931, Merle Ravey was making beer at the "Klott House," located two doors west from Heinie Wainer's house on Pine Street, New London, Wisconsin.

In February, 1932, I was arrested by Federal Officers C. R. Olson, Baseman and Merkel while delivering some of the aforesaid beer to the Pinehurst Roadhouse, near Shawano, Wisconsin, Frank, "Dutch" Miller was helping me deliver it, but he was not arrested. We were then making beer at the George Zitsky residence, located on the County Line Road on on the edge of New London, Wisconsin. I continued to make beer, both at the Bauer Farm and at a cottage on a farm (10 acres) near Sugar Bush, Wisconsin. We made on an average 75 to 109 half barrels and 150 cases (24 bottles each) per week. When not busy making beer, 1931, 1932, I helped can alcohol at the brick house located just east of Ted Wallmer's Tavern (of New London, Wisconsin). I lived there from December 27 or 28, 1931, until mid-summer of 1932. Federal Officers raided the barn on this place about the middle of June, 1932. They were accompanied by Chief of Police Harry Macklin. They asized one drum (53-gallons) of alcohol. Heinie Wainer had control and possession of the barn at that time. I rented the house and garage from him. During 1931, 1932, 1933 and 1930, we were continually bothered by hi-jackers, stealing our liquors and beer.

In July, 1932, I moved to Spring Road, New London, Wisconsin, and thence to East Hancock Street, New London, Wisconsin, in September, 1932, where I stored the entire product of the illicit brewers and also at times quantities of whiskey for Heinie Wainer. Ed Rossey and Frank "Dutch" Miller, "Stub" Wyman, Johnny Traubar, George Davis, Abe Dorschner, Louis Sasso, Sam Wainer have helped me either in beer or liquor handling.

I have also worked in illicit liquor with Earl Blink, Donald

Blink, August Becker, Pete Bondie, Charles Christensen,
110 Glen Froelich, Kenneth Whitney and Harland Ravey.
Heinie Wainer and Louis Wainer acted as bosses of these activities.

In April, 1933, I drove Wainer's Ford panel truck, which bore a sign, "Triangle Produce Co.", from Fond du Lac, Wisconsin, near airport, to New London, Wisconsin, with 1,000 gallons of alcohol, (one-gallon cans) each load. I made two trips. I stored this alcohol in Earl Blink's Garage at his home, three blocks from New High School Building in New London, Wisconsin.

About April 27, 1933, at Gus Rossey's home, on Mrs. Louis Wainer's Farm, located about three miles north of New London, Wisconsin, we (myself, and Earl Blink, Merle Ravey) were told by Pete Bondie to hide in the house and watch for hi-jackers. Soon came "Buck" Blink, Johnny Traubar (just after hi-jackers entered the basement). We rushed the hi-jackers, but only succeeded in catching George McElroy, the truck driver. I struck this truck driver with my fist and he was taken into the house, where Sam Wainer and Pete Bondie helped guard him. We then went into the basement and took out the alcohol, over 700 gallons in cans, and seven or eight drums (55-gallons) loaded this alcohol to the brick house just east of Ted Wallmer's Tavern, where we stored it. In the winter of 1930, I saw about 8,000 gallons of alcohol stored at Ethelmer Fuhrman's home in the Rossam House in in southern part of New London, Wisconsin. I helped haul this alcohol from there and I know it belonged to Heinie Wainer, as he told me to go and help haul it. I was helped by E. Fuhrman, Merle Ravey, Earl Blink, August Beck, Abe Dorschner, Louis Sasse, Eddie Bealling, John Traubar, George Davis, "Fat" Blink.

In November, 1932, I helped one Elmer ..... tear down a still N. E. of Clintonville, Wisconsin (over ten mile N. S.) and about seven or eight miles from the lime kiln. I was sent to do this work by Heine Wainer. While we were tearing it down, Elmer said, "This still is hot and we must get it out of here in hurry."

When the Wainers received word that the Government Officers had seized their cutting plant at Fond du Lac, Wisconsin, in April, 1933, Earl Blink came to my home at 3:00
111 A. M. and awoke me to help move liquor and alcohol from the Klott House and from Earl Blink's home. I

only helped load the trucks. Louis Wainer, "Stub" Wyman, Kenneth Whitney and Leo Nichols went on the trucks.

In May, 1933, I was sent by Heine Wainer to Oconto, Wisconsin. He said he would give me a job in his brewery there. Frank Miller had been taken there about six weeks before me by Ed Rossey. We were getting the place ready to make beer. Heine said that Johnnie Strange was to be our boss. I worked until July 4, 1933, when Mr. S. Liengelbach came and told us to leave as they could not get a permit as long as Miller and I were employed there. Vilas Rundhammer was bookkeeper for Heine Wainer at the time and paid me $7.50 per week for seven weeks, awaiting to see if I could go back to work at Oconto Brewery.

In September, 1933, I started to work in Wainer whiskey cutting plant in the brick house east of Ted Wellmer's Tavern; also at the "cottage" just north, about 1½ miles, labeling and filling bottles, corking and capping them. Heine and Louis Wainer directed the work and paid me $15.00 per week. We averaged, in these two cutting plants, about 100 cases of whiskey per day. I quit working for Wainers about November 15, 1933, and just afterwards I stole 270 gallons of whiskey from Heine Wainer. I took it from the "cottage" located about three miles north of New London, Wisconsin.

The day after I stole it, Vidas Rundhammer came to my house and demanded that I return the whiskey. I refused, he left. Soon afterwards, Heine Wainer met me at his office (in the Old Ramm Garage-Ford) and gave me $100.00 for returning the whiskey.

At one time when I was helping can alcohol, the Wainers were handling 2,000 to 3,000 gallons per day.

From November 13, 1933, until Christmas, 1933, I often saw trucks bearing Wainer employees go in and out of the cutting plant at the brick building just east of Ted Wellmer's Tavern.

.....

112 Subscribed and sworn to before me this fourth day of May, A. D. 1934.

.....

H. A. GODDARD
Investigator.

Witness:

.....

HOWARD C. BEAUDRIE
Investigator.

Mr. Clifford: Now your Honor, I want to move to strike out all portions of that statement that involve any other defendant other than Al Tessen for the reason that the statement was made after the conspiracy was through, at a time when he was doing nothing in the performance of it, and it is not binding as far as the statements against these conspirators are concerned and for the further reason that many of the statements contained in that are pure hearsay statements and conclusions.

The Court: The motion will be denied.

Mr. Clifford: May I have an exception to that?

Mr. Koelzer: The man who made that statement is one of the defendants here?

The Witness: He is.

Mr. Koelzer: We will offer that in evidence if the Court please.

Mr. Clifford: I don't understand there is to be an offer of the statement besides reading it in the record?

The Court: Yes.

Mr. Clifford: Then I renew my objection to the offer of the statement for the same reasons that I have just mentioned.

The Court: The statement is receivable in evidence as the statement made by one of the defendants and it is received as such, and as to the defendants other than the one giving the statement, with an appropriate instruction with respect to it.

Mr. Clifford: May we have an exception on the accepting of the statement itself?

(The statement referred to was marked EXHIBIT 5 and received in evidence.)

113 *Cross-Examination by Mr. Clifford.*

I did not tell Tessen that he would not be indicted. I did not tell him he would never hear anything more of the case or that he would not get in trouble. I merely informed him of his constitutional rights. I never saw the man until I met him in the library of the U. S. Attorney's Office and took that statement. H. C. Beaudry and Roy Kinlock were there, and part of the time Floyd Granger. Beaudry and Kinlock are officers in our department. These officers had been with me all day. First time I ever saw him was in that room.

Redirect Examination by Mr. Koelzer.

I recall Mr. Koelzer telling me this man Tessen wanted to see me, and I believe Mr. Koelzer introduced us.

The Government rests.

Mr. Clifford: We move to discharge all the defendants except Heine Wainer, for the reason that it does not appear that any of them operated the business of Wholesale Liquor Dealer; it being my contention that the Statute is directed against individuals who are in the business as owners, and it does not affect the employees at any time.

Discussion between Mr. Clifford and the Court with reference to aiding and abetting.

Mr. Leahy: Motion to dismiss all counts as against Carl Christensen.

Motion denied.

Mr. Clifford: May we have exceptions?

The Court: Yes.

Mr. Leahy: Exception to the denial of the motion.

The Court: Yes.

LOUIS WAINER, a defendant sworn, examined by Mr. Clifford, testified:

I am forty-five years old and am in the business of cattle buying and farming. Have been a cattle buyer for twenty-five years. I took over this farm nine years ago. In
114 1925 I was buying cattle. I have a farm and I got the farm in 1926. Operated ordinary farming. Located two miles from New London. I took charge of the actual operation and continued until I was sick in September, 1933. From 1925 up to that time I had nothing to do with the sale of or manufacture of alcohol, or with the sale or manufacture or transportation of beer. There was no sale or manufacture of beer or alcohol on my farm. I know where the Kents live. I have dealt with the Kents with reference to cattle. I did not know this Jof Howard. I did not rent the Kent farm. I had nothing to do with the operation of the still or never paid Kent any money. I had nothing to do with the operating in Fond du Lac or with the erection of any still. I was never on any such property. I had nothing to do with the trucks of alcohol which were seized in Oshkosh. It did not belong to me. Same was not working for me, nor was Earl

Blink or Adolph Siebold. In 1933 I was not carrying on a business of wholesale liquor, or in February, March and April. Up to April 3, for two months, I was in Rochester, and then I got home and I was home for a couple of weeks and then I went to Chicago. I stayed in Chicago until April 3, when I got home, 1933. My family was living on the farm. It was necessary for me to give up the operation of the farm because the doctors said I should not work for a year. I made arrangements to give up the operation of the farm and to move my family, the 15th of April. On the 3rd of April I came back in New London and found my wife had moved part of the furniture. She told me the man came over and told her he had to get off the place he was one; he had to get off down there sooner than he expected. There was part of my personal property still on the farm and the balance in the house. My wife rented the brick house. I got home at ten o'clock in the evening of April 3. The family had gone to bed. I got up in the morning and went out in the country. When I got back that evening I found that federal officers had been there. I had seen the bottles of liquor 115 on the table that was introduced in evidence. These bottles did not belong to me. I did not know they were in the house. There was some equipment in the barn back of it. I had nothing to do with that barn or the tanks. I have not occupied that house before for a period of five or six years. I did not place any of that equipment in there or those tanks. I had no charge or possession of it previous to April 4 and did not have any of that equipment on April 4, and never intended to use any for rectifying spirits. I never did any rectifying. My occupation of that house would be a temporary proposition. I didn't figure to move in that house; I figured to get a house somewhere in Appleton. Up to the time I took the farm I was in the cattle business quite extensively, operating in Waupaca and Outagamie Counties. Had 50 to 70 head of cattle. I would buy some for beef, some for dairy. I dealt with the farmers in two counties. I had an office as far as the cattle business was concerned. I did not pay all of the rent for that, I paid $5.00 a month. I paid Hoffman about five dollars a week for tending the telephone and keeping what little books of account there were in the cattle business. Hoffman worked for my brother. Heinie had nothing to do with the cattle business and I had nothing to do with Heinie's business. Hoffman is dead. He died in 1931 or '2 sometime, I can't remember.

Cross-Examination by Mr. Koelzer.

At present I have no office. It was located on north Water Street. I maintained no cattle sheds in New London. What cattle I had I kept on the farm and shipped them directly from the farm to the railroads. The other cows we shipped from the stock yards. Heinie or Same never had sheds in New London that I know of. I do not know all of these men at the table. I know some of them by sight. Some of them came to my office and talked to Hoffman. My brother Heinie and Hoffman came there. I don't know what Heinie did. Just talked to some of the boys. I never paid much attention to what he was talking about. I knew he was in the liquor business. None of these men here were ever paid in the office.

I never saw anybody get any money. I never saw any-
116 body go to the drawer and take anything out and hand it to these men. I never saw money in the office. The Buick garage is three blocks, Ford garage two blocks from the house. I went to the garage to fix a car. That is all I had seen of them. Sometimes at the Ford or Buick garage. I never saw none of them. In 1931 I lived in New London, on Waupaca Street. There was a barn back of that. There were no wires with a check bell from the house to the barn. I do not know of any such valve. There never was any cases of whiskey or bottles stored at my house. I never had a labeling machine. I did not have the barn. Heinie had the barn; all we rented was the house. He kept some stuff there, cases of beer bottles. I don't know what else. I did not see any alcohol taken in or brought out. I know there was some beer cases in the barn but I didn't know of anything else and didn't care to. It wasn't any of my business. I lived in the house. I seen trucks come in and out. I didn't know they were loaded. I never examined them. I never went up to see whether it was loaded and I don't remember if I ever talked with Langrie about stealing stuff, or Mrs. Harris about getting back some alcohol that was stolen. I don't remember ever driving there. I know young Sawall. I had never been in there to talk to him. I know one of the Besaws but I can't say which one. I hired several fellows to work on my farm, but none to work in the brewery on the Rossey farm. I never saw the brewery. Ed Rossey never had a farm. Gus Rossey did, but I saw no brewery on either Ed or Gus Rossey's place. I know Albert J. Blink. I first met him at the farm where I had some cattle. I never talked to him about

renting it. I did go to see Mr. Kent. Kent came to the office one day and there was a fellow down there waiting. He asked me if I knew Kent and I told him I did. He asked if I knew where he lived. He said he wanted to rent a farm and I took him out. This was not the first time I went out there, but the first time I ever talked about renting it. I never talked to Kent about renting it or Mrs. Kent. I deny that I ever rented it. This man I took out there told me his name was Joe Howard. He was a stranger to me and I never saw him before. I don't know Doc or Howard
117 Siats. The man on this photograph is not Joe Howard, the man who came to my office. I was sued by the Kent people and had a trial. I took the witness stand and a jury verdict was returned against me. I never paid Mr. Kent any money for the rent of the farm or the barn. The only conversation I heard between Howard and Kent was about the price. Nothing was said about what the farm was to be used for. I don't remember seeing the man again after that. When this case came up I was trying to find the man, but I couldn't. He walked into the office and I took him out to the Kent farm. I don't think I have seen him since. I never gave Mr. or Mrs. Kent any money. I never at any time went out to look at that barn even after the suit was started I never went out there to see what damage was done; it wasn't my affair. I never rented the place. One can't help being sued. I never went to the Blink farm. The suit was not started against me for damages. A summons was never served on me. I raised corn and grain on this farm. I wouldn't say that I am an expert farmer, but I am a farmer. I work on the farm with the men and I know something of farming and I have learned a lot since I owned the farm. My main business is cattle buying. Since I got the farm I have done as much on the farm as I have spent cattle buying.

Redirect Examination by Mr. Clifford.

This suit against me by the Blink's, I was not personally served with summons, and I did not authorize anybody to pay Blink anything for his farm.

Recross Examination.

In the Blinks case, I did not retain a lawyer and no lawyer appeared for me.

118 MRS. LOUIS WAINER, a witness on behalf of defendants, sworn, examined by Mr. Clifford, testified:

I am the wife of the defendant, Louis Wainer. We were married 22 years. We have three children and lived on a farm acquired seven years ago that my husband operates. We both work on the farm. I help with the general work. My husband's principal business for the past fifteen or twenty years was in the cattle business buying and selling cows. We first moved on the farm three years ago. I worked and he worked. We continued to live on the farm until the 4th of April last year. He got sick in the fall, September, 1934. He went to Chicago with his folks for a while to see the doctors and then went to the Mayo's in December. From December down to April, 1933, he was in Chicago. He was told at Rochester to quit work for at least a year as he would have to have a severe operation and his condition was very bad. I was with him at Rochester. We hired a man with his family to operate the farm. He was to come on April 5 of last year and we moved off on April 3. There was no such stuff as the whiskey bottles and alcohol produced here ever on our farm. We never had any alcohol or whiskey equipment or beer or brewery equipment on the farm. There was never any transportation or manufacture of either beer, whiskey or alcohol on our farm. On April 3, we only moved part of the beds, furniture and dishes. We were not moved in the house as a permanent proposition. It was temporary because we expected to move to Appleton just as soon as we could find a house to move in. We did not have anything to do with the tanks in the basement nor were they used while I was in the house for rectifying purposes such as mixing alcohol, whiskey and water. The barn on the back of those premises was not occupied by us. It was locked. We had no equipment in the barn. I did not know what was in there. We did live in New London on Waupaca Street and rented a house but never a barn. There was never anything stored in
119 the basement. It was a wide open basement. We had nothing to do with the barn at all. I think Heinie had the barn. I wouldn't say. I never saw him there. That is what people said. When we lived on Waupaca Street, my husband would be out all day on the road buying and selling cattle. I used to go with him and at times we would take the little ones and go. He would drive around New London up as far

north as Shawano. Dairy cows he would keep on the farm. Sometimes we would have a lot and sometimes a few. If the buyer came with him, he would sometimes have a carload of 22 or 24 head. The average load was 22. The residence on Waupaca Street was never used as an alcohol storage plant or for the rectification of alcohol or whiskey. I have never seen my husband at any time sell, deliver, transfer or handle whiskey, alcohol or beer. We never had a label machine in our house nor any brewery equipment. We have seen my husband around New London in the alcohol or beer business.

Cross-Examination by Mr. Koelzer.

We moved on the farm four years ago the first of next September which would be in 1932. Before that, we lived on Waupaca Street. I understood that Heinie had the barn in back. I never asked him. It was none of my business. I never seen people go into the barn. The property there runs 300 feet, the barn would be 75 feet from the house. There was a road came in this side of it. The cars would come in occasionally. I never bothered with them. I had my three babies to take care of and never saw anybody go in or out or any men that I recognized. I know all the men here except the two men sitting there. I never saw any of these young men go in there. I seen them come in our place and steal little things from the children. I never saw them steal anything from the barn. We left the farm, moved to the brick house last year. I was not there when the officers searched. I was out playing cards and I came back in time for dinner. We rented that place from Wallmers. I don't know who occupied it before we moved in. It never concerned me. After the raid I didn't ask who was in there before. It never concerned me. I saw tanks standing in the shed but it had
120 nothing to do with me. It was all fixed up. It was just a big water tank. I never saw this liquor here until the man showed it yesterday. We had just taken the clothes from the hooks in our house, put them in the car and hung them on the wall and went to bed. I never saw the liquor in the closet. There were some odd pieces of furniture there when we moved in. I just saw one tank when we moved in. That was in the wash shed. I didn't ask my husband who lived there before. He had grief enough with his sickness without putting any more on him. I am not so well acquainted with Heinie. He comes to our place occasionally. I never talked

to him about his business. He has never been in the cattle business with my husband to our knowledge, nor has Sam. They used to drive cattle for my husband when they were little kids. I have gone around to my husband's office, but not very often. I have three children and do not have much time. My husband has never been in the beer business. I mean he has never been in the beer business and I know it. I know his general life. I am with him most of the time at home. I am not with him all the time but I certainly would know. I know his books and everything and what he does. He never said to me about them going out to recover alcohol that was stolen. He never had any such business. I know he has hired some kids to plant cabbage and a boy to drive the truck. Johnnie Christenson used to be our truck driver. We ran the farm while we lived in New London. Rossi used to live on the farm then we had a hired man that lived with Rossi because he didn't want to come back and forth every night. His name was George Abraham. I do not know Gerald Besaw. He might have worked for us cutting cabbage. I would have to see his face to know.

Redirect Examination by Mr. Clifford.

We never moved any such bottles as are here from our farm to this residence. My husband's touring car was used to take the dishes over to the brick house. The other big stuff we took with the cattle truck. We carried small
121 things just to save some packing and set them on the seat of the car or the floor. It was only half a mile distance. We had to get out because the folks were moving the next day. A man called Frenchy Lebeau helped us drive the cattle truck.

EDNA HILKER, a witness on behalf of defendants, sworn, examined by Mr. Clifford, testified:

I live in New London. I am 22 years old and I started to work the first of September, 1933. They lived on the farm. I stayed there until the spring of 1934. There was never any alcohol or beer equipment machinery on the farm. I went down to the barn occasionally. There was no such equipment in the farm buildings or residence. The latter part of September, 1933, Mr. Wainer went to Rochester to the Mayo

Brothers. He was there six weeks. He came home about two weeks and then went to Chicago to the doctor on account of his health. We were to move off the farm on the 15th of April, but the other people were going to move in. They had to get off the other place. They were hurried and wanted to move in on the 5th so we had to go before. Mr. Wainer was not there when we started to move. Mrs. Wainer, I and Lebeau did the moving. We did not move any of this stuff contained in those bottles and in those tanks from the brick house. It was not on the farm. We moved the dishes and small things and our clothing in the car and the big things in the truck. The house was not settled on the night of April 3rd. Some clothes were laid across the table and some were hung up in the closet. I did not see any of these bottles in the house. I hung up the clothes after I got through with supper that night but it was dark in the house and I did not turn on the light in the closet. I did not see any such bottles there at all. I was there when Mr. Geittman, the federal officer came there, but no member of the family was there. Mr. Wainer came home the night of April 3 after we had gone to bed and left early the next morning saying he would be back. The first I saw of these bottles was when the men that made the raid brought them to the dining table. I had not been down the basement previous to this and there wasn't any
122 such equipment used by the Wainers such as is described, either by Wainer or his wife.

Cross-Examination by Mr. Koelzer.

I did not see any equipment in the barn or shed or any tanks. I came there and helped Mrs. Wainer occasionally before September. I never worked for them in Waupaca Street. I know nothing about that place. I know Mr. Wainer's business was a cattle buyer.

MRS. LOUIS WAINER recalled, examined by Mr. Clifford:

The barn in back of the brick house was locked. We did not try the lock.

VINCENT LEBEAU, a witness for defendants, sworn, examined by Mr. Clifford, testified:

I live in New London and buy cows and cattle now. I was employed by Louis Wainer off and on for ten years. I worked for him on the farm helping to drive and haul cows for three years. I drove his truck. I am familiar with his business. I was out with him in the country almost every day. He was a cattle buyer and covered quite an extensive territory. It was about fifty miles around New London. He kept his dairy cows on the farm and I worked with him on the farm. I never lived in Waupaca Street. I worked on the farm, but did not stay there all night. I did not see any alcohol equipment, brewery equipment, bottles, kegs or anything of that character on the farm. I was through every building. I lived in 1932 on the farm. I was out to the farm every day when he was there and when he went to the farm. I did haying and things like that. There were 110 acres under cultivation. The principal crops were corn and grain. There were no such bottles as the agent had here that were moved from the farm residence to the brick house. Louis was not there when we moved. He was in Rochester for his operation, then went to Chicago, came back and went to Chicago again. I never saw Louis Wainer engaged in the manufacture of beer, alcohol or its transportation.

Cross-Examination by Mr. Koelzer.

I never handled any beer or alcohol myself. My duties were confined to driving cattle, trucking, going out with Louis.

I had nothing to do with the liquor business. I know
123 Heine and Sam Wainer in sight and most of these other men. I know nothing about the liquor business, or that it was going on. I never heard of it about New London or saw loaded trucks in garages or storage places for alcohol. I know Longrie, Saunders and Mathewson. All I heard about alcohol is what they said. I went once with them to get some one gallon tins. Mathewson was the leader of the bunch. He told me where he got them in a barn belonging to Scheid. He said we could sell them. I know Scheid. He was Earl Blink's father-in-law. Sometimes I wouldn't be working for two weeks and then maybe a month. Heinie Wainer didn't have anything to do with the cattle business that I know of. I

have seen these fellows around. I have played cards with them. I never seen any of them handling money. I have seen men come around there and ask for Heinie, but no conversation about loads.

AARON MINTZ, a witness for defendants, sworn, examined by Mr. Clifford, testified:

I know Louis Wainer and that he is in the cattle business. I live in Appleton. I am in the cattle business myself and have dealt with him nine years. I know his reputation in New London and the vicinity and it is very good.

PETER SCHETTER, a witness for defendants, sworn, examined by Mr. Clifford, testified:

I live in New London and am a farmer. My farm adjoins Louis Wainer. I have known him for fifteen years. I know that he operated a farm and know his reputation. He has a good reputation, and is a law abiding citizen. He is a good citizen and a hard working man.

HENRY STICHMAN, a witness for defendants, sworn, examined by Mr. Clifford, testified:

I live in New London in the city of New London but on a farm. I have been a farmer for forty years. I know Louis Wainer for twenty years. His business has been cattle buying and that he operated the farm and that his reputation in that community as a law abiding citizen is very good.

Cross-Examination by Mr. Koelzer.

I have had quite a lot of business transactions with Wainer dealing with cattle. I know the other Wainers but am
124 not very much acquainted with them. I have heard of the Wainer gang and Wainer syndicate in New London and of illegal alcohol business around there, but I have never heard Louis Wainer connected with it. I have heard his name mentioned in the papers. I don't remember of him being arrested. My belief is that he is a law abiding citizen.

I have found him very good in my own dealings with him. I have found Louis honest and a good citizen. It requires a lot of virtues. He never cheated me. I dealt with him in horses. I don't think I have heard them talk about him with reference to anything other than cattle and horse deals. He is considered a good cattle buyer. That is all that the public would talk about. He has been in that business as long as I have known him. I don't know his reputation as a law-abiding citizen. Only personally, I would call him a law abiding citizen. The people I am acquainted with seemed to think he is a nice man, a good honest fellow and as a cattle buyer and horse dealer. I have never heard anything bad about Louis in any respect and I have never heard his name given the reputation of being connected with the liquor business or with his brother.

LOUIS WAINER, recalled, examined by Mr. Clifford:

I was never arrested or convicted of any criminal offense in my life.

Cross-Examination by Mr. Koelzer.

I never went to Macklin about a car that was seized for transportation of alcohol or a car that did not have proper license plates on it.

CHARLES CHRISTENSON, a defendant, sworn, examined by Mr. Leahy, testified:

I am 33 years old. I live in New London and have for 18 or 20 years. I now work on P. W. A. work. I started a month ago. Before that I worked on F. R. A. and W. W. A. I was employed by Louis Wainer six or eight years ago driving and trucking cattle. He was living on Waupaca Street. He then lived on the farm. I took care of his cattle, clipping them, and getting them ready for shipping. I was never in a still in my life, never handled any alcohol or beer. I
125 was never on the Kent farm or in the city of Fond du Lac on any piece of property known as the Supple property. I never transported beer or alcohol nor engaged in the distillery business. I never sold any liquor when I was on the

Wainer farm. LeBeau helped me. I have gone through the cattle shed. My duties took me in around the various farmers in that vicinity. He would have as many as 60 or 70 cattle. I was never arrested and never was on a truck for transporting alcohol.

Cross-Examination by Mr. Koelzer.

I worked for Louis Wainer. I started in 1926 or 1927. I quit working in 1932. I did not work for him in 1933. I never worked for Heinie. I know John McGowan. I was never in Long Lake. I never had a load of alcohol put on any truck. I was driving for Louis Wainer or any one else. I was never on a Wainer truck that I can remember. I know the Triangle School House near New London. I don't know whether he was with me. He had cattle in the barn near there but I never saw any alcohol stored in the hay and did go and load up the rear end of my car with alcohol. It must have been with a truck. I never hauled any empty steel drums in my truck. I know Tessin. I hauled cows to his place. I have been out to the Ed Rossi farm to take cattle out there.

Redirect Examination by Mr. Leahy.

Louis Wainer never owned a Buick coupe that I know of.

ED ROSSI, a defendant, sworn, examined by Mr. Leahy, testified:

I am 41 years old. I live in New London. I am married and now working in the woods. I never owned a farm, but my father did. His name was Gus and he died in 1932. I remember Kuenmeillein. I saw him on a farm there. He arrested me for having a brewery. I pleaded guilty to that and went to the House of Correction. It was my brewery. I never worked for the Wainers at any time. I was never on the Kent farm. I never owned or operated or had any interest in any still. I was never in the Supple Coal yard in Fond du Lac. I know all of these men here now, but I do not know Siebold and Lueck before this case. None of the Wainer
126 Brothers or any of the defendants were in that brewery except Sasse.

Cross-Examination by Mr. Koelzer.

I know all the rest but Lueck. I have lived in New London for the past three or four years. I lived on my father's farm back in 1931 he moved off. Somebody else moved on. I don't think I have been on that farm since my father moved off in the fall of the year. Saunders never came out to get beer. I could have furnished him beer at Mr. Wainer's place as that is where we had the brewery. We then owned that farm and I had the brewery there. I did not in the place in town. I never saw Saunders get any alcohol there in town. I know Boulac. I never loaded up any alcohol or beer for him at any time. I know Shorty Davis. I never worked with him. I worked for myself. I never worked for Wainers. I have been in the Ford and Buick garages just in and out and visited with the boys. Louis Wainer and I had phonograph and pin games together. We stored them at the garage and repaired them. These were phonograph machines for taverns, saloons. I know Fuhrman. When I lived on the farm there was no alcohal there. I could not tell you when it got there. I never saw any or handled any or saw any loads of corn sugar go in and out of New London. I knew that there was illicit liquor business around New London. I had heard people talking about it, but nothing else. I sold my beer to taverns. We did haul it in a car. I never stored it but kept it a place where it was made. I never sold any alcohol. I would go to the garage three or four times a week; maybe once every two weeks. I did not see cars go in and out with loads. Some cars from other states were in the Ford garage, but I never saw any loads.

LOUIS SASSE, a defendant, sworn, examined by Mr. Leahy, testified:

I am single, I live 4½ miles north of New London. I am a farmer and have been all my life operating a farm of 94 acres which my dad owns. I never was in a still and never saw one. I was never in the city of Fond du Lac by the Supple Coal Yard. I don't even know where the Kent farm is and was never on it. I never transported alcohol or beer on the public highways. I never canned any alcohol for anybody. I have never been arrested. I know most of
127 these boys.

Cross-Examination by Mr. Koelzer.

I do not know Lueck. I never worked for Heinie Wainer. I never had any business dealings with him. He never paid me my wages. I know Furhman. I never worked with him. My father and mother lived on the Sasse farm but it was not used as a storage place for alcohol. I did not go there and work with Furhman and I never stored a low grade of alcohol in the back of the Elwood barn. I got acquainted with these men around New London. I never had any dealings with them and never been in the Buick garage very often. I would go in there with my car for repairs and that is all. I have heard about Schrader and Mathewson stealing alcohol. I never heard of them taking alcohol from my farm. It was owned by my father and mother. I knew Heinie from selling fur and other stuff. I never saw these other defendants driving truck. Once in a while I went to town. I have seen Tessin. I never went over to his house. All I know about the alcohol business is a rumor. I was arrested at the time Rossi was picked up. I owed him some money and went over to pay him and they picked me up. Ed got six months and they let me go.

ERVIN DORSCHNER, a defendant, sworn, examined by Mr. Leahy, testified:

I am 22 years old. I have lived in New London with my sister and brother-in-law. I am working for the Hamilton Canning Company and have been for two years. I have helped on the farm. I worked for Louis Wainer for about three weeks. I worked on the corn field, filled silo and I was never on the Kent farm. I do not know where it is. I have been through Fond du Lac but do not know where the Supple Coal Yard is. I was never where any still was erected there. I have never seen one. I never transported liquor on the public highways. I have helped wash bottles for a while back in 1931. Joe Hoffmann paid me. They were washed in a barn. I have never been arrested and convicted of anything.

Cross-Examination by Mr. Koelzer.

128 I started washing bottles for Hoffman in 1931. I am 22 years old. I never worked for Heinie Wainer or Sam

Wainer nor any of these men. None of them paid me. I have been in the Wainer office. Jos Hoffmann paid me there once for washing bottles for about six or seven weeks. I never drove a truck. I don't remember of being at the Sasse farm. I have been around the Buick and Ford garage. I have never driven any truck in or out of there or saw any alcohol there at the Rush Station or seen large quantities or alcohol in New London. I have never seen trucks loaded with alcohol.

TED WALLMER, a defendant, sworn, examined by Mr. Clifford, testified:

I am 44 years old. I am married and have a family. I am in the tavern business and live outside of New London and have operated a tavern, dance hall and restaurant. My wife helps and I have other help coming in on busy nights. I had nothing to do with the Kent farm and was never on there. I have never had anything to do with the still with reference to the alcohol coming from there or doing anything with it. I was never in the business of selling liquor. I never helped to conceal liquor on a farm four miles north of New London. I never had any connection with any such farm and am not able to identify it. I had nothing to do with the 1,650 gallons of alcohol on a truck seized in Oshkosh. I never knew of its existence. I had some liquor of my own for in my own business that was seized. I had it in connection with my tavern. I never worked for Heinie Wainer. I never worked as bookkeeper for him. This restaurant and place of business of mine is out of the city limits about a mile and a half from there. I have a son that helps me and busy nights, I put in two bar tenders. My son is going to college. I was never down to the Supple Place or any still on it and knew nothing about it at all. The operation of my tavern and restaurant requires all of my time. I know all of these defendants but two of them, Lueck and Seibold. New London is a small town of about 4,500. Most of the younger people frequent my dance hall. I know Heinie and Louis Wainer, but I have never worked for Heinie Wainer.

129 *Cross-Examination by Mr. Koelzer.*

The dance hall is about three years old. Before that I had a restaurant and tavern. I never sold Judson Boulac any

liquor or handled any alcohol or beer transactions with him. I bought from him quite a few years ago. I never waited on him. I heard his testimony. I don't believe he said that I sold him any. I remember Saunders. I never waited on him. Frequently I would go in the Wainer office at New London and visited and play cards. This was before the dance hall was erected. I had no business connection with Heinie Wainer legal or illegal and have never handled wholesale liquor or beer. I know Heinie Wainer and Shorty Davis. I have never had any dealings with Shorty Davis. In 1932, I entered a plea of guilty with Heinie Wainer and Shorty Davis to conspiracy to violate the Prohibition Act in the Western District of Wisconsin but I am sorry that I did.

Redirect Examination by Mr. Clifford.

I have bought beer from Boulac for my tavern. I was never interested in selling any beer to Boulac. I do admit that I sold liquor in my tavern in violation of the law, but I was never a party to any conspiracy such as is alleged in this indictment.

Recross Examination by Mr. Koelzer.

Neither Boulac or Saunders ever paid me money for beer or alcohol. I never arranged for them getting a load of alcohol or beer. They seized some alcohol at my place that I bought from Stub Wyman. He is dead. He was a great friend of mine and so was Shorty Davis. I never saw him in the Buick garage. I had seen him at the cattle office sitting around and playing cards.

ADOLPH SEIBOLD, a defendant, sworn, examined by Mr. Clifford, testified:

I live in Oshkosh. I am a married man. I am not working now. In 1925, I lived in Oshkosh and up to date. I have never lived in New London. I never worked for Heinie Wainer. I had nothing to do with the Kent farm or any such distillery. I do not know where the Kent farm is or anything about it. I never aided or abetted the selling of liquor as a wholesaler in New London in 1933. I never worked in
130 New London for Sam Wainer or any other Wainer. I was arrested on January 13, 1933. I had been home that

morning at 719—14th Street. I have a small farm outside. I was coming from the farm and happened to come by there. I seen the truck was broken down and delayed by tire trouble, so I took the man with the tire to town to have it repaired. I took the man back to the truck again. He wanted to get back to the truck and leave the tire there to be repaired and have one of the tire men come out there and repair it or bring it out there to him. I have not seen that truck before. They had not been to my farm or residence. I do not know Sam Wainer. Never saw him except that time at the truck. There was Earl Blink at the truck. I never met him before. I just ran into them accidentally on the highway. My farm was a guinea pig farm, but I do not live in there. There was a barn there but no house. Liquor was never hauled or stored there that I know of. I do not know Fuhrman or Piccolo Pete. I did not hear him testify that cars of spirits were unloaded at the farm. He only testified that liquor was stored there. Liquor was not stored there that I know of. The farm was rented out by my brother while I was sick. I gave him charge of it during 1931 or 1932. I have been sick on and off. I have been out to the farm occasionally in 1931 and 1932. When I was out there I was raising guinea pigs. The farm was rented. My brother rented it. I couldn't take care of it so I turned it over to him and paid no attention to it. I never saw any trucks go in or out. I have been sick since I came out of the service and have never been well since. I am not able to do hard labor. When the agents arrested me, I was helping to move drums off the truck to the other truck. I just wanted to help them out with these drums. I was there about ten minutes. I did not know what was in the drums. These men never offered to pay me. I may have put eight or ten drums from one truck to the other. I just helped them a little. Some officers came along and arrested me. I was never tried in the case, but I am being tried now—a defendant in this case.

MERLE RAVEY, a defendant, sworn, examined by Mr. Leahy, testified:

I live at Royalton, Waupaca County. I live in New London three or four years. I am a married man and have been
131 working on the P. W. A. for a month. I am a common laborer. I have never been on the Kent farm. I don't

know where it is. I never hauled supplies in the direction of the Kent farm. I have been through Fond du Lac. I never had anything to do with Supple or his brother nor was I ever in his buildings there. I never transported alcohol around New London and never was in 1933 or any other time engaged in the operation of a distillery. I had hauled some beer in 1931 for Jack Yacob who now lives in Detroit. I hauled to a few taverns in New London. Yacob then lived at the Elwood Hotel. I did some work for Louis Wainer on the farm, a day at a time. I have not been arrested or convicted.

Cross-Examination by Mr. Koelzer.

I drove truck for Waupaca County but never alcohol or canned alcohol nor helped load trucks. I know all the defendants except Lueck and Seibold. I have seen some of these men at the garages just sitting around. I know Fuhrman. I never worked with him at any alcohol storage place. I never seen him working. I don't know of Heinie staying at the Elwood Hotel. Yacob stayed there for about six months. I never went over to the hotel. I would meet him at the Buick garage on a side street in New London. It was his brewery. I have seen Heinie Wainer going into the hotel, but I do not know where he lived. I helped Louis Wainer on the farm doing silo filling and haying. That's the only kind of work I ever did for him. The only others, I have seen there would be Charles Christenson. I do not know a man by the name of Howard Thorn. I have not seen any alcohol plant or storage place for alcohol in the vicinity of New London or seen loaded trucks or trucks that looked as if they were loaded with alcohol around there.

132 ERMAN LUEKE, a defendant, sworn, examined by Mr. Leahy, testified:

I am thirty-seven years old, live in Green Bay, and have for a year. Before that I lived in Fond du Lac. I have never lived in New London. I know Supple, who runs the coal and coke yard in Fond du Lac, but not very well. I heard him testify and know of the Bannister Subdivision from what I have heard him explain in court. I never had a transaction relative to real estate with either of the Supples. I was there when Supple and the other men arranged for the renting of

the property. That was in the summer of 1932. I heard part of their conversation. I did not pay particular attention to it. I rode down with these other men. I never bought a lot from Supple in my life. I heard the conversation with reference to lumber and the price of lumber. Supple was to get and haul the lumber from the Nuss Lumber Company. They would pay and Supple, in turn, would pay Nuss Lumber Company as they hauled it. I was there when this man gave them something. I think it was $1700.00, paid to Louis Supple. There was two more besides myself and Supple. I was never in Supple's and Wainer's presence. At the time they made the deal about the property I heard one ask to move the hay and get the deed. Supple would have the deed fixed up and he would call for it. He told Supple to use any name on the deed he saw fit. The name on the deed was Balsam. I never paid Supple any money and never had any transactions with him except buying a little coal from him. I was in the tavern business in Fond du Lac a short time. I was sick; had a serious operation and for two years didn't do anything. Supple knew the man I was talking to and I am positive Supple knew his right name. They were together. He should know. He is the Fond du Lac man and I have seen them together often.

That man is not Heinie Wainer. I never had any deal-
133 ings with Supple besides buying coal for my residence,
or any trouble with him. I have no idea why they should testify unless parties bribed them to push it on somebody that didn't have it coming. I know a man that uses the name of Brown. I never got any coke or sugar; never used an alias. I never dealt with Supple relative to coke and corn sugar. I never saw Heinie Wainer there closing a deal and I never told Supple to make the deed to Balsam, or have the order slips made to Brown. I think the Federal Government knows who George Brown is. I do. His right name is Bill Kurth. I know him from the name he used. He used that as G. Brown. I was told by different people that he used that name. I was in the illicit alcohol business recently in Brown County, but not associated with any of the Wainer's or any of these men. I was not associated with G. Brown.

Redirect Examination by Mr. Leahy.

G. Brown was there and did business with Supple at the time. He was the man I mentioned as Kurth.

Recross Examination by Mr. Koelzer.

I couldn't say where Kurth is now, unless he is in Fon du Lac. That is his home.

M. H. RUCKDASHEL, a witness for defendants, sworn, examined by Mr. Clifford, testified:

I live in New London and have for six years. I am night clerk with the Elwood Hotel. I knew Heinie Wainer when he was staying there. He came late in '29 and '30. He continued to make his home there for a year and a half, two years. I think he left the Elwood Hotel in 1930. He has not lived in the village since then. At that time he was not a married man.

Cross-Examination by Mr. Koelzer.

I did not see him in New London after 1932. Never saw him come back. At the time he was staying at the El-
134 wood Hotel. I have seen some of these men in town, but I have never seen them at the Elwood, nor seen them with Heinie Wainer. He did have a few visitors at the hotel. He would keep average hours, twelve, one o'clock, sometimes. Sometimes earlier. Out once in a while. I noticed nothing peculiar with the lighting in his room. Some men that came there registered. That is all I know of them. Once in a while from out of the State. I have heard of an alcohol gang in New London, but do not know any of the fellows that were in it, except hearsay.

Redirect Examination by Mr. Clifford.

There are other individuals besides Mr. Wainer who had the reputation of running plants there and some of them stayed at the hotel.

Recross Examination by Mr. Koelzer.

I don't know that Heinie lived on Pine Street. I knew he lived in town for a while before he came to the hotel. I do not know where he lived after he left the hotel. There is more than one hotel in town.

LOUIS WAINER, recalled, examined by Mr. Clifford, testified:

My brother Heinie left New London three or four years ago, at least three years anyway. He moved to Chicago. Married a little over two and a half years ago and since then his wife and family have lived in Chicago. Have visited down there. In the spring of 1933 he was not living in Wisconsin or New London at all. He was living in Chicago.

Cross-Examination by Mr. Koelzer.

He left there three or four years ago. I am sure of that. I didn't hear the hotel clerk say it was two years. I know it was about three. I don't know that the hotel clerk is
135 mistaken. I seen Heinie a few months ago in Chicago. I have seen him several times since two or three years ago. Saw him in Chicago and Milwaukee. I don't know that he has been in Milwaukee quite a bit. He had no business interest in Milwaukee in the last two years that I know of. I have not seen him in New London in two years. I have never seen him in New London the last few years. I saw him in Chicago and Milwaukee. Once I saw him when I was in the hospital in Rochester. Came to see me when I was in bed. I was in the retail liquor business in New London for nearly a year. Heinie was not with me or connected with me. I have met him in Milwaukee in the past two or three years. If I had seen him within the last two or three years I would be reasonably sure of it. I said I had seen him in Chicago but not in New London.

Redirect Examination by Mr. Clifford.

At the time I was in the retail business was after the prohibition amendment had been repealed and it was a perfectly legitimate business and I had a license.

Recross Examination by Mr. Koelzer.

I was in that retail liquor business the early part of 1934 and at the time these agents searched my house and found that cutting plant. That was the 4th of April, 1934.

Redirect Examination by Mr. Clifford.

From January, 1934, up until April, I did not have active charge of that business.

Recross Examination by Mr. Koelzer.

I had a Mr. Nelson who ran it. I didn't think there was anything illegal about it.

136 JOHN TRAMBAR, a defendant, sworn, examined by Mr. Leahy, testified:

I am thirty-eight years old. I live in the town of Mukwa, two miles from New London. I am a farmer, operating a farm of 160 acres with my mother. We also have a hired man and have also bought wool and furs in the winter, picked up anything I could. I have been a trapper and a buyer. The farm was never raided or inspected by the Government agents, and during the past ten years have never manufactured any alcohol. I have transported and canned alcohol for Frank Williams, back in the latter part of 1930, or early '31. I bought furs for the Wainers. I never worked in the city of New London and never was near the Supple Coal Yard or around the Kent farm. I know Schrader and McElroy when I see them. I did not go out to the farm where they claim this beating was received. I do not know that McElroy was not telling the truth when he said I helped hold him prisoner. I was not there. I know McElroy when I see him. He lives near Hortonville. I know Fuhrman and he helped me can alcohol for Frank Williams. He canned it on a chicken farm three miles from New London. It was vacant at that time. There was another fellow called Elmer the Dago. I had met him back of the stores. That is what they called the old fair ground belonging to Jack Hinkle. Williams paid me and I loaded them. Sometimes foreign cars. They would drive in the shed. Williams took care of the conversations. We went and loaded them up and brought them back. I know who most of these men were but never worked with them. They all live around New London. This farm belongs to my mother and we have a married couple on it now. I work when there is work to be done. Wainer lived at the hotel, but not elsewhere that I know of. I do know that he had a house in New

London on Pine Street. I did not wash bottles in a barn back of Louis Wainer's and never drove a truck for Heinie Wainer. Our farm is two miles south of New London. We never had alcohol in the cemetery or the barn. Fuhrman was not
137 there very long. He merely helped me can alcohol. I have been around to the Buick garage and would haul empty drums there when I was working for Frank Williams. We met those cars in back of the opera house.

Redirect Examination by Mr. Leahy.

I was out to the farm the next day where McElroy received his beating. The Chief of Police came there a few minutes after I got there. I was visiting Mrs. Rossey.

Recross Examination by Mr. Koelzer.

I don't know Elmer the Dago's right name. The truck came from Florence they were driving. I never saw them with Heinie Wainer.

Defense rests.

Rebuttal.

HARRY MACKLIN, recalled:

Direct Examination by Mr. Koelzer.

The reputation of Louis Wainer in New London was not so good as a law-abiding citizen. I base that on information I received from different people, general talk around town.

Cross-Examination by Mr. Clifford.

I wouldn't say his reputation was good, but that it was not so good. As far as his dealings with the cattle business is concerned, it was good.

Testimony closed.

Motion to dismiss all defendants with reference to the third count because of failure to prove alcohol was concealed on the farm four miles north of New London.

The Court: Motion will be denied.

Mr. Clifford: And exception.

138 That the court thereupon, after hearing the argument of counsel, charged the jury as follows:

139 Charge of the Court.

The Court: Gentlemen of the Jury: I will be as brief as I can in giving you such instructions as I hope may aid you in the consideration of the testimony that has been introduced in this case and in the discharge of your duty as jurymen in determining the issues that have been raised here by an indictment against the defendants on trial and certain others, which indictment contains four counts, the first of which charges the defendants and others with the crime of conspiracy and the other three counts charge the defendants and others with the commission of certain offenses against the Revenue Acts of the United States.

I will say, preliminarily, by way of enabling you to keep your minds upon the real case that is here, that this case has nothing to do with prohibition; that it is just what I have stated, namely, a charge that has been made of the existence of a conspiracy, whose object is shown by the indictment,—I mean, whose character and object, and it may be helpful if I will take the trouble to read this conspiracy charge as it is found in the indictment, the indictment being that the defendants, naming them, and others, "did, on or about the first day of July, in the year nineteen hundred and twenty-five, the exact time and place being the Grand Jurors unknown, and at all times thereafter up to and including the date of the filing of this indictment, knowingly, unlawfully, wilfully and feloniously conspire, combine, confederate and agree together and with each other, and with divers other persons whose names are to the Grand Jurors unknown, to commit an offense

and offenses against the United States, to-wit: to unlaw-
140 fully, wilfully and knowingly violate Sections 281, 282, 290, 193, 284, 306, 307, 328 and 1181 of Title 26 of the United States Code of Laws, and to defraud the United States; by having in their possession and custody and under their control distilling apparatus set up and not registered according to law; by engaging in the business of a distiller and the business of a rectifier without giving to the Collector of Internal Revenue of the district wherein such distilling and rectifying business was to be carried on the written notice required by law; by setting up stills, boilers and other vessels to be used for the purpose of distilling without first obtaining

from the Collector of Internal Revenue of the district in which such stills, boilers and other vessels were intended to be used the permit required by law; by carrying on the business of a rectifier, the business of a wholesale liquor dealers, and the business of a wholesale dealer in malt liquors without paying the special tax and taxes as required by law; by carrying on the business of a distiller without giving the bond required by law; by engaging in and carrying on the business of a distiller with the intent, on the part of the said defendants, to defraud the United States of the tax on the spirits to be distilled by the said defendants; by making and fermenting mash, fit for distillation and for the production of spirits and alcohol, in buildings and on premises other than a distillery duly authorized according to law; by engaging in and carrying on the business of a rectifier with intent to defraud the United States of the tax on the spirits rectified, or to be rectified by them, the said defendants, and with intent to aid, abet and assist each other in defrauding the United States of the tax on distilled spirits, and by receiving and rectifying distilled spirits
which had been and distilled spirits which were to be
141 removed from a distillery to a place and places other
than the distillery warehouse provided by law; and by removing and aiding and abetting in the removal of distilled spirits on which the tax had not been paid to a place and places other than the bonded warehouse or warehouses provided by law, and by concealing and abiding in the concealment of distilled spirits so removed."

That, Gentlemen, is a recital in the indictment of the character of the conspiracy which it is charged the defendants and others entered into.

Now, before going further I will say something to you about the law of conspiracy, and, in order to be concise, I will read to you what, after all, is quite elementary in an exposition of what is meant by the crime of conspiracy:

"A conspiracy is formed when two or more persons agree to do an unlawful act; in other words, when they combine to accomplish by their united action a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means, and the offense is complete when one or more of the parties so agreeing together does an act to effect the object of the conspiracy, so that if two or more persons at any time agree that they will do an act or come to an understanding in any way that an act be done whereby a law of the United States is violated, that is to say, a law

which makes it an offense to do an act, and anyone does some act to carry out that object, they are all conspirators; all who participate in it."

"To constitute a conspiracy, it is not necessary that two or more persons should meet together and enter into an explicit or formal agreement for an unlawful scheme or that
142 they should directly in words or in writing state what the unlawful scheme is to be or the details of the plan or the means by which the unlawful combination is to be made effective.

"It is sufficient for two or more persons, in any manner, or through any contributions, or by any device, come to a mutual understanding to accomplish the common unlawful design.

"Where an unlawful end is sought to be effected and two or more persons, actuated by the common purpose of accomplishing that end work together in furtherance of the unlawful scheme such persons become conspirators, although the part which any one of them is to take in the conspiracy is a subordinate one or is to be executed at a remote distance from the other conspirators."

In determining the question of the existence of a conspiracy you will take into consideration the relation of the parties to one another, their personal and business association with each other and all the facts in evidence that tend to show what transpired between them at or before the time of the alleged combination, as well as the acts performed by each party subsequent to such alleged combination, in respect to the subject matter of the alleged conspiracy, and from these facts and circumstances you will determine whether a combination in fact existed and whether such combination was illegal in its inception or became illegal at any subsequent time.

A conspiracy is rarely, if ever, proved or provable by positive testimony. When a crime of high magnitude is about to be committed by a combination of individuals, they do not act openly, but covertly and secretly. The purpose of
143 the combination is known only to those who enter into it and their guilt can generally be proved only by circumstantial evidence.

The common design is of the essence of the charge and this may be made to appear when the defendants steadily pursue the same object whether acting separately or together, by common or different means, all leading to the same unlawful result.

In determining the question of the formation or existence of a conspiracy, the acts and declarations of the persons accused, may, among other circumstances, be considered by you.

Statements of one, and, in some instances, two or more of the defendants in the absence of the other defendants and conversations with some of the witnesses on the part of one or more of the defendants in the absence of the others have been given in evidence—that is true here, gentlemen—the individual letters and telegrams of different defendants have been introduced—that is not a matter that is pertinent in the present case—these declarations, statements and communications tend to show the existence of the alleged conspiracy and the alleged connection of the persons making the same therewith.

Acts or declarations of individual defendants are not to be considered by you as affecting any other defendant unless you find from the evidence the existence of such conspiracy, that such other defendant was a member thereof and that the acts were done and such declarations were made in pursuance of the common purpose, set out in the indictment, to effectuate the same.

The same rule applies to the acts and declarations of persons, if any, who may be shown by the evidence to have joined in the conspiracy but who are not named as defendants in the indictment.

144 To constitute the offense of conspiracy, which is made punishable by statute, there must be not only the conspiring together by the parties but the formation of the conspiracy must be followed by an act done by one or more of the parties to the conspiracy to effect its object, so, if you should find that the defendants, or some of them conspired together, as charged in the indictment, to do the things that are therein charged, the next inquiry is whether any person who was a party to the conspiracy did any of the acts that are charged as overt acts.

Now, Gentlemen, at this point I will say to you, in view of the fact that comment has been made upon it, that it is not incumbent upon the part of the Government to prove that all of the overt acts which are set forth in the indictment, and I think there are ten or eleven here, were, in fact, committed, nor is it necessary for the Government to prove that any particular defendant who is here on trial committed or participated in the commission of the act. The law requires

proof, first, as to whether there was a conspiracy in existence and whether one or more of the overt acts which were charged in the indictment was or were done or committed by some one who was a party to the conspiracy.

Now, I say to you that the indictment here, charging as it does the various things that I have indicated by its reading, need not be proved as to every one of those elements of the conspiracy. It sufficies if the proof satisfies you that a conspiracy of the general character of that described in the indictment came into existence and was pending at the time within three years of the time when this indictment was returned.

Therefore, take this case, and, under the law, as I have given it to you, ascertain, in answer to the first question
145 that arises under this count in the indictment, what your answer will be to the question: "Was there a conspiracy of the general character described in the indictment in existence?" And consider that, regardless of what the answer might be as to who were the parties to it, and, in answering that question take the proofs as they have been adduced here as to the things that were done.

It makes no difference, particularly, as to the time when the inquiry began, but does the proof here satisfy you that within the period covered by the indictment, namely, within three years prior to May, 1934, there were things done, and I will speak of the evidence illustratively, such as the operation or erection, the maintenance of stills, or the handling of illicit liquor in various ways, the concealment of the same, and all of the incidentals of the operation of a still and of an illicit liquor business, which satisfies you that two or more persons were engaged in association in concurrence with each other to bring about a situation, if you find that to be the situation, which the proof discloses.

In other words, put to yourselves the simple question: "Does the proof here show that the various situations disclose by the evidence with respect to the conduct and operation of stills and the carrying on of an illicit liquor business in various ways, that those were all separate, isolated, unconnected transactions, or that they were the result of the concurrent action of two or more persons having the common design to do that thing.

Now, it is for you as jurors to answer that question but I express to you the opinion that much of the evidence here

points most pertinently to supporting the conclusion that there was more than one person connected with these
146 things and that these matters disclosed by the proof were not isolated, unconnected, unrelated acts, but the fact is for you to find, and, if, under this consideration, upon my exposition of the law dealing with conspiracy, you can not find that there was any conspiracy in existence during the period covered by this indictment, then your verdict should be, upon this count, the defendants are not guilty.

If, on the other hand, you reach the conclusion that the proof here satisfies you, as I shall indicate to you that you should be satisfied, namely, to a moral certainty, that there was a conspiracy of the general nature described in the indictment, having the objective with respect to illicit stills and the illicit liquor business and the violation or the disregarding, rather, of the rather full regulations of the United States Government, which regulations, if not complied with, make those who fail to comply with them an offender. If you are satisfied that the proof shows a combination of a confederation among persons who were aiming to accomplish that unlawful design, your next question should be, "Does the proof here show that some one who was a member of the conspiracy, quite regardless of any of the defendants, any particular defendant, committed one or more of the overt acts charged in the indictment as having been committed by some member of the conspiracy, by some party to the accomplishment of the unlawful design for the purpose of effectuating and carrying out that design?"

Now, as I indicated a while ago, it is not essential, in answering that question, that the proof should show which, if any, of the particular defendants committed the so-called overt acts. It sufficies if you find up to that state of the in-
quiry that some one who was connected with the accom-
147 plishment of the unlawful design, through a confederation, did commit one or more of these acts in order to carry out, in whole, or in part, the unlawful confederation charged in the indictment.

And if you answer that question in the negative, even though you find that there was a conspiracy, that ends this case, and you should acquit all of the defendants on trial.

If, on the other hand, you reach the conclusion that these overt acts which are charged in the first count of the indictment, to the number of, I think, nine or ten, or some of them, were committed for the purpose of carrying out the

conspiracy, your next inquiry will be which of the defendants who is here on trial was a party to such conspiracy, and in answering that inquiry you should again refer to the acts done by the particular defendant, his declarations, his association with others; his presence from time to time at a place where violations of the Revenue Act were taking place; the particular acts which he may have done which, although at the time of doing them, were disconnected from other acts, still necessitate your inquiry as to whether he did it as a member of this conspiracy, or this understanding, this common confederation to carry out this common purpose, and, in that connection, Gentlemen, as I referred, in the first instance, to the law, the law does not require that in supporting the charge of conspiracy the exact limits of the conspiracy be defined by the proof; it is not necessary that the names of the participants in it be all disclosed, nor is it necessary that the part which any one conspirator was to play, to the exclusion of another, must be shown; it need not be shown that any particular conspirator knew all who were in the conspiracy; the one thing that you must direct your attention to is whether the particular defendant, any particular defendant, consciously, understandingly, and
148 with knowledge participated in an act which was an act to be accomplished by the conspiracy, and he did it with the consciousness that, as such, he was participating in the furtherence of the common design.

Now, the other counts of the indictment deal with what in the law we call the substantive offenses; namely, the erection of a distillery or its operation without obtaining leave, and the defendants are charged with doing the acts which are the subject matter of the second, third and fourth counts of the indictment, and the question for you to determine, under each of those counts is which, if any, of the defendants participated in the doing of those acts.

We have a law which declares that any person who aids, abets, counsels or advises the doing of an unlawful act shall be regarded as a principal in the doing of the act, and, therefore, the inquiry under these counts may involve your determination of the relationship of the defendants or any of them who participated in these acts for the purpose of determining whether, as such, they participated as aiders and abettors, as persons knowing what was going on understandingly and purposely, desiring to assist in carrying out

those purposes, no matter how slight their own participation may have been.

With these instructions as covering the law, I desire to make reference to some of the testimony that has been here introduced and has been commented upon for the purpose of guiding you in estimating such testimony and determining what credit you may give to it.

On behalf of the Government there has been some testimony introduced, which was given by persons who were
149 themselves committing illegal acts. I refer, for the present, to those who admited here upon the stand their wrongdoing in respect to the stealing of liquor. That testimony was introduced for the purpose of showing, through such witnesses, the connection of persons here charged with situations wherein these witnesses committed their acts. Now, the fact that they were convicted of their wrongdoing, the fact that they may have been accomplices in the doing of the things that are charged in the indictment against the defendants is a fact to be considered by you as bearing upon their credit. An accomplice, under the law, is a competent witness. The fact that he confesses his participation in the wrongful act does not, in the eye of the law, destroy his power nor his right to tell or to attempt to tell the truth, and, therefore, when this testimony comes before you as jurors you are to approach its consideration open-mindedly. You have no right, as jurors, to say that you will ignore the testimony of one who has been convicted of a crime, or that he is an accomplice, merely because he has been convicted or has confessed himself to have been an accomplice. You are required to consider it open-mindedly for the purpose of finding out what weight you will give to it.

And you have a riyht to see, upon the evidence, the extent to which you find corroboration of the testimony of a witness so given in the testimony of other witnesses or in other testimony in the case and you have a right, under the law, to accept the testimony of witnesses so circumstanced, without any corroboration, if you are satisfied that the truth is being told.

Now, Gentlemen, the case here necessitates your inquiring into the evidence and determining the relationship of each of the defendants, either to the subject matter of the
150 first count, or to the subject matter of each of the other three counts, for the purpose of determining the matter of participation.

I have said to you in other cases that the Jury should not convict in a criminal case unless it is satisfied that the proof shows such guilt to a moral certainty and to an exclusion of a reasonable doubt. That does not mean that you should take the position that there may be a mistake in every case; that you are unwilling to approach the consideration of the testimony as men, both in and out of court, approach the examination of situations wherein the truth is being elicited, and if you are satisfied here upon the proofs with respect to any or all of the counts, with respect to any or all of the defendants, of the truth of the Government's charge or charges in the indictment and can say to yourself that you are morally certain of the matter of guilt as to any or all of the defendants, you should find the defendants or such of them with regard to whom you so feel, guilty, as charged in the indictment. If you have an honest misgiving about it, if you can say that you have a reasonable doubt, why, you should give the defendant or defendants with regard to whom you so feel the benefit of it and acquit them.

Are there any exceptions to the charge?

Mr. Clifford: We wish to except as far as the three charges we requested were not given.

The Court: They were refused.

Mr. Clifford: And also the charge with reference to the fact that their conviction should be beyond a moral certainty and beyond a reasonable doubt.

The Court: I tried to say to a moral certainty and to the exclusion of a reasonable doubt.

151 IN THE UNITED STATES DISTRICT COURT.

* * (Caption) * *

Now come the above named defendants by their attorneys, and request the court to instruct the jury as follows:

I.

If you should find that any one of the defendants allege to have been a party to the conspiracy, was a party, but that he abandoned all effort in the conspiracy and took no further part in it for a period of three years prior to the time of the return of the indictment herein, you should not find him guilty under the charge of conspiracy on file herein.

II.

Certain witnesses of the Government have admitted their complicity in the crimes charged, and are known as accomplices. The testimony of such witnesses should be received with care and caution, and scrutinized carefully, and the defendants, or any of them, should not be convicted unless the jury is satisfied that such evidence is true, and taken with all the evidence, establishes the guilt of the defendants without any reasonable doubt.

III.

The defendants, under Count 2, of the indictment, are charged with carrying on the business of a wholesale dealer without having paid the special tax. If the defendants, or any one of them, were merely employed by one who did
152 carry on such business, as a servant or employe, and were not interested as owners, they cannot be found guilty of carrying on the business as wholesale liquor dealers, and you should find them not guilty under the charge set forth in Count 2.

Dated: .....

THOMAS E. LEAHY and
G. F. CLIFFORD,
Attorneys for Defendants.

153 Mr. Koelzer: May I suggest that the Jury be instructed that the burden is not on the Government to prove failure to comply with the Internal Revenue Law in regard to giving bond and paying taxes and so forth.

The Court: That is true. The Jury is so instructed that the Government does not assume that burden.

Swear an officer.

(Officer sworn.)

The Court: Gentlemen, you may retire with the bailiff and deliberate upon the case and when you have agreed upon a verdict let your foreman sign it and return to the Court.

Portions of Exhibits 2 and 3 are as follows:

154 That the jury returned a verdict of guilty as to all defendants on all counts, but counsel then requested a stay until December 9, which was granted, for permission to

file a motion for a new trial; that the following motion was filed:

"For the reason that the court erroneously instructed the jury as follows:

'If, on the other hand, you reach the conclusion that the proof here satisfies you, as I shall indicate to you that you should be satisfied, namely, to a moral certainty, that there was a conspiracy of the general nature described in the indictment, having the objective with respect to illicit stills and the illicit liquor business and the violation or the disregarding, rather, of the rather full regulations of the United States Government, which regulations, if not complied with, make those who fail to comply with them an offender.'

That the court overruled said motion and sentenced the defendants, Heinie Wainer, Louis Wainer, Ted Wallmer, Donald Blink and Ed Lueke as follows:

As to the Wainers:

155 First count: The sentence of two years to the Federal Penitentiary at Fort Leavenworth and a fine of $10,000.

Second count: Imprisonment for two years in the penitentiary aforesaid and a fine of $1,000.

Third count: Imprisonment for two years in the penitentiary aforesaid and a fine of $1,000.

Fourth count: A fine of $100.00.

George Davis—Three months and $100.00.

Ed Lueke—Six months and $100.00.

156 PORTIONS OF EXHIBIT 3.

STATE OF WISCONSIN.

IN CIRCUIT COURT, WAUPACA COUNTY.

Emma Kent and Elmer Kent,
Plaintiffs,

vs.

Henry Wainer and Louis Wainer, individually, and as co-partners, doing business as Wainer Bros.,
Defendants.

SUMMONS.

The State of Wisconsin, to the Said Defendants:

You are hereby summoned to appear within twenty days after service of this summons upon you, exclusive of the day

of service, and defend the above entitled action in the Court aforesaid; and in case of your failure to do so, Judgment will be rendered against you according to the demand of the Complaint, a copy of which is herewith served upon you.

WENDELL MCHENRY,
Plaintiff's Attorney.

P. O. Address Waupaca Waupaca County Wisconsin.

157 PORTIONS OF EXHIBIT 3.

STATE OF WISCONSIN.

IN CIRCUIT COURT, WAUPACA COUNTY.

Emma Kent and Elmer Kent,
Plaintiffs,

vs.

Henry Wainer and Louis Wainer, individually, and as co-partners, doing business as Wainer Brothers,
Defendants.

COMPLAINT.

Now come the plaintiffs by Wendell McHenry, their attorney, and for cause of action against the defendants allege as follows:

I.

That during the year 1930 and at the present time, these plaintiffs were the owners and are still the owners of those premises known and described as follows: The Northwest Quarter (NW¼) of the Northeast Quarter (NE¼) and Southwest Quarter of the Northeast Quarter and West one-half of the Northeast Quarter of the North one-half, of Section 28, Township 22, North, Range 14 East. Totaling in all 110 acres, all situated in Waupaca County, Wisconsin, and is improved among other things by one barn of the dimensions of 34 feet by 60 feet approximately.

II.

That on to-wit the month of April, 1930, these plaintiffs through an oral agreement rented said barn on the premises

described as aforesaid, to the said defendants, individually, and as co-partners doing business as Wainer Brothers, for the monthly rental sum of Fifty Dollars ($50.00) per month, and that in pursuance of said agreement the said defendants continued to occupy said premises until to-wit the month of July, 1930, when said premises were raided by Federal Authorities, and it was then and there ascertained for the
158 first time by these plaintiffs that said barn was being utilized by said defendants for the purpose of manufacturing alcohol therein.

III.

That the said defendants when they rented said premises, undertook to return said premises at the termination of their lease in the same condition and in as good repair (ordinary wear and tear accepted) as they were when they took possession. That on the contrary, said barn was practically a complete ruin by reason of the operation carried on by the said defendants, in that the said defendants for the purpose of carrying on their unlawful business of operating an alcohol still in said barn did then and there during the term of said lease completely tear out large portions of said barn so as to install vats and other necessary utensils incidental to the manufacture of alcohol, and that a large portion of the roof of said barn has been burned up, all to the damage of the plaintiffs herein to the sum of Two Thousand Dollars, ($2,000.00).

That in addition to the foregoing damages which these plaintiffs suffered by reason of the operations of the defendants on said premises, the said defendants allowed overflow mash or fluid to run out upon a large portion of ground surrounding said barn and upon the premises heretofore described, by reason whereof these plaintiffs are informed and believe and so state the fact to be that said plot of ground where said fluid ran has been totally destroyed for any further use in raising farm produce to the further damage of these plaintiffs in the sum of Two Hundred ($200) Dollars, making a total damage due and owing to these plaintiffs from the defendants by reason of their destructive and unlawful use of said premises as aforesaid in the total sum of Twenty-two Hundred ($2200.00) Dollars.

Wherefore these plaintiffs demand judgment against the

defendants both individually and as co-partners doing
159 business as Wainer Brothers in the sum of Twenty-two Hundred ($2200.00) Dollars and in addition thereto their costs and disbursements in this action.

WENDELL MCHENRY.

State of Wisconsin }
County of Waupaca } ss.

EMMA KENT being first duly sworn on oath, says that she is one of the plaintiffs in the above entitled action; that she has read the foregoing complaint and knows the contents thereof, and that the same is true of her own knowledge in substance and in fact except as to those matters and things therein stated on information and belief, and as to those matters she believes it to be true.

EMMA KENT,

Subscribed and sworn to before me this 29th day of September, A. D. 1931.

WENDELL MCHENRY
Notary Public, Waupaca County, Wisconsin.

My Commission expires March 3rd, 1935.

160 PORTIONS OF EXHIBIT 3.

STATE OF WISCONSIN.

IN CIRCUIT COURT, WAUPACA COUNTY.

Emma Kent and Elmer Kent,
Plaintiffs,
vs.
Henry Wainer and Louis Wainer,
Defendants.

ANSWER.

The defendant, Louis Wainer, answering the complaint herein admits and denies as follows:

I.

Admits paragraph one of plaintiffs' complaint;

II.

Denies each and every allegation of paragraphs two and three of the plaintiffs' complaint.

Wherefore, this defendant demands that the plaintiffs' complaint be dismissed and that he, the defendant, be awarded the costs and disbursements incurred in this action.

LOUIS WAINER.

State of Wisconsin }
County of Outagamie } ss.

LOUIS WAINER, being first duly sworn on oath, deposes and says, that he is one of the defendants in the above entitled action; that he has read the foregoing answer and that the same is true of his own knowledge.

LOUIS WAINER.

Subscribed and sworn to before me this 14th day of October, 1931.

ELMER R. HONKAMP.
Notary Public.

My commission expires March 3, 1935.

161 PORTIONS OF EXHIBIT 3.

STATE OF WISCONSIN.

IN CIRCUIT COURT, WAUPACA COUNTY.

Emma Kent and Elmer Kent,
Plaintiffs,
vs.
Henry Wainer and Louis Wainer,
Defendants.

ANSWER.

Answer of Henry Wainer exactly the same as that of Louis Wainer.

162 PORTIONS OF EXHIBIT 3.

STATE OF WISCONSIN.

IN CIRCUIT COURT, WAUPACA COUNTY.

Emma Kent and Elmer Kent,
Plaintiffs,
vs.
Louis Wainer and Henry Wainer, individually, and as co-partners, doing business as Wainer Brothers,
Defendants.

JURY VERDICT.

We the jury in the above entitled action find for the plaintiffs, Emma Kent and Elmer Kent, and against the defendants, Henry Wainer and Louis Wainer, and assess the plaintiffs damages at $500.00.

Dissenting: Duncan Campbell, L. N. Fletcher.

HAZEL MORTON,
Foreman.

Dated December 4th, 1931.

163 PORTIONS OF EXHIBIT 3.

STATE OF WISCONSIN.

IN CIRCUIT COURT, WAUPACA COUNTY.

Emma Kent and Elmer Kent,
Plaintiffs,
vs.
Henry Wainer and Louis Wainer, individually, and as co-partners, doing business as Wainer Brothers,
Defendants.

JUDGMENT.

At Resumed November Term of said Court held in the Court House in the City of Waupaca, Waupaca County, Wisconsin, on the 12th day of February, A. D. 1932.

Present:

Hon. Byron B. Park, Circuit Judge Presiding.

The above entitled action being at issue, and having come

on for trial at said term, and having been tried before the Court and jury on the 1st, 3rd, and 4th days of December, A. D. 1931, Wendell McHenry appearing as attorney for plaintiffs, Emma Kent and Elmer Kent, and Elmer R. Honkamp appearing as attorney for the defendants, Henry Wainer and Louis Wainer, individually, and as co-partners doing business as Wainer Bros., and a general verdict, which is now on file and of record, having been rendered on the 4th day of December, A. D. 1931, as follows: (Title omitted)

"We, the jury in the above entitled action, find for the plaintiffs, Emma Kent and Elmer Kent, and against the defendants, Louis Wainer and Henry Wainer, and assess the plaintiffs' damages at Five Hundred ($500.00) Dollars.

Dissenting: L. N. Fletcher, Duncan Campbell.

HAZEL MORTON,
Foreman.

Dated December 4th, 1931."

And thereafter motions after verdict having been made, which motions were duly heard before the Court, and the 164 Court having denied all of defendants' motions and granted plaintiffs' motion for judgment on said general verdict for the sum of Five Hundred ($500.00) Dollars.

And an order for judgment in favor of the plaintiffs, Emma Kent and Elmer Kent, for the sum of Five Hundred ($500.00) Dollars, having been made on the 12th day of February, A. D. 1932.

Now therefore, on motion of Wendell McHenry, attorney for plaintiffs,

It Is Ordered and Adjudged that the plaintiffs, Emma Kent and Elmer Kent, do have and recover of and from the defendants, Henry Wainer and Louis Wainer, the sum of Five Hundred ($500.00) Dollars as damages, together with the sum of One Hundred Fifty Four and 98/100 Dollars ($154.98) costs and disbursements as tax, in all the sum of Six Hundred Fifty Four and 98/100 Dollars ($654.98).

Dated, this 12th day of February, A. D. 1932.

By the Court:

ING. OVROM,
Clerk of Circuit Court for Waupaca County, Wisconsin.

165 PORTIONS OF EXHIBIT 3.

STATE OF WISCONSIN.

CIRCUIT COURT, WAUPACA COUNTY.

Emma Kent and Elmer Kent,
Plaintiffs,
vs.
Henry Wainer and Louis Wainer,
Defendants.

SATISFACTION OF JUDGMENT.

Whereas a judgment has been entered in the above entitled matter in the sum of Five Hundred Dollars ($500.00) principal and One Hundred Fifty-four Dollars and Ninety-eight Cents ($154.98) costs,

And whereas one Joseph Howard has appeared at my office personally, there admitting his personal liability and denying the liability of the above named defendants; and, he, then and there making full payment and satisfaction of the amount of such judgment and costs as rendered in the Court aforesaid, in the amount of Six Hundred Fifty-four Dollars and Ninety-eight Cents, ($654.98);

I, Wendell McHenry, attorney for the plaintiffs, hereby acknowledge full satisfaction of the judgment rendered in this action in favor of the plaintiffs and against the above named defendants.

WENDELL MCHENRY,
Attorney for the Plaintiffs.

Witnessed this 29th day of April, 1932.

ING. OVROM,
Clerk.

166 PORTIONS OF EXHIBIT 4.

STATE OF WISCONSIN.

IN CIRCUIT COURT FOR WAUPACA COUNTY.

A. J. Blink,
Plaintiff,
vs.
Henry Wainer, J. Wainer and Louis M. Wainer,
Defendants.

AMENDED SUMMONS.

The State of Wisconsin—To said Defendants:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend the above entitled action in the court aforesaid; and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint, of which a copy is herewith served upon you.

JOHN MORGAN,
Attorney for Plaintiff.

204 First National Bank Building,
Appleton,
Outagamie County, Wisconsin.

167 STATE OF WISCONSIN.

IN CIRCUIT COURT FOR WAUPACA COUNTY.

Title—The Same.

COMPLAINT.

Now comes the above named plaintiff, by John Morgan, his attorney, and for cause of action, alleges:

1. That the above named defendants are co-partners doing business under the firm and style of J. Wainer & Sons.

2. That for a long time prior to April 1, 1930, the plaintiff was the owner of a large farm situated in Sections 6 and 7 in the Town of Cicero, Outagamie County, Wisconsin, and

that a large portion of said farm was and is very well adapted for pasture purposes, with a good set of buildings located on a portion of the premises in Section 7 in said township.

3. That it was represented to the plaintiff that the defendants were desirous of renting such lands for pasture purposes and that sometime in the month of March, 1930 that the defendants, represented by the defendant, Henry Wainer, for such purposes, approached the plaintiff and that thereafter and on or about the first day of April, 1930, the plaintiff demised and let unto the defendants the following described property, to wit:

That part of Lots 2, 3 and 4 of Section 7, Township 24 North, Range 17 East, used for pasture purposes, including the buildings located upon said premises, Outagamie County, Wisconsin;

for an agreed annual rental of $1200.00, payable $100.00 per month, for a term of one year commencing May 1, 1930.

4. That thereafter the defendants paid to the plaintiff the sum of $300.00 cash on said rental, and on or before the first day of May, 1930, took possession of said premises and remained and held possession of the same until sometime in the month of December, 1930, when the Federal authorities raided said premises for the reason, as this plaintiff is
168 informed and believes, that the defendants were operating a still or stills in the barn on said premises, and that the defendants thereafter abandoned said premises, but that on account of the season of the year that the value of the premises for rental for agricultural purposes had passed and that the plaintiff was unable to release said premises.

5. That thereby and on account of the failure of the defendants to carry out their contract, they are still and now owe the plaintiff the sum of $900.00 rent which would have been payable to him according to the terms and conditions of the lease.

1. That for a separate and second cause of action, the plaintiff realleges paragraphs 1, 2, 3 and 4 of his first cause of action.

2. That according to the covenants and agreements in said lease contained, the defendants covenanted and agreed to occupy said premises and use them for the purposes of pasture and feeding only and that at the end of the said term of one year they were to deliver up said premises to the plaintiff in as good condition and state of repair as they were at

the time of said leasing, ordinary wear, decay and destruction by the elements excepted.

3. That notwithstanding that said lease contained said covenants, that the defendants entered upon said premises and that notwithstanding that said barn was equipped for a modern dairy barn with water, steel stanchions and concrete floors and mangers, that they cut and destroyed the mangers, stalls, stanchions and floor and that they cut and destroyed the timbers and sleepers beneath the second floor of said barn, and damaged the roof and tore the bins out of the granary and either disposed of or destroyed the lumber.

4. That furthermore, they dug a large cesspool for the purpose, as this plaintiff is informed and verily believes, of disposing of refuse from their stills and that as a result of the refuse from said stills and cesspool, the ground about it was polluted and also the spring near said barn, all to the plaintiff's damage in the sum of $1200.00.

169 Wherefore, the plaintiff demands judgment against the defendants for the sum of $900.00 on his first cause of action, together with interest from the date when said installments became due according to the terms of said lease, and for the further sum of $1200.00 on his second cause of action, together with his costs and disbursements of this action.

JOHN MORGAN,
Attorney for Plaintiff.

State of Wisconsin }
Outagamie County } ss.

A. J. BLINK, being first duly sworn, deposes and says that he is the plaintiff in the above entitled action; that he has read the foregoing complaint and knows the contents thereof and that the same is true of his own knowledge, except as to those matters therein alleged on information and belief and as to those matters he believes it to be true.

A. J. BLINK.

Subscribed and sworn to before me this 22nd day of March, 1932.

JOHN MORGAN
Notary Public, Outagamie County, Wis.

170 STATE OF WISCONSIN.

CIRCUIT COURT, WAUPACA COUNTY.

Title—The Same.

PROOF OF SERVICE.

State of Wisconsin } ss.
Waupaca County }

FRED HOLTZ, being first duly sworn, says that he is not a party to this action and is over the age of twenty-one years.

That on the 26th day of March, 1932, at the City of New London, ... County, Wisconsin, he personally served the within Amended Summons and Complaint on J. Wainer, one of the defendants above named. That he knew the party so served to be the J. Wainer mentioned in said Amended Summons and Complaint and at the time of service he endorsed upon the same the date upon which the same was served and signed his name thereto.

That on the 26th day of March, 1932, at the City of New London, Waupaca County, Wisconsin, he personally served the within Amended Summons and Complaint on Louis M. Wainer, one of the defendants above named. That he knew the party so served to be the Louis M. Wainer mentioned in said Amended Summons and Complaint and that at the time of the service of said papers, he endorsed upon the same the date upon which the same were served and signed his name thereto.

F. A. HOLTZ,
Constable.

Fees:

Service	1.00
Copy	.50
2 M. travel	.20
	$1.70

Subscribed and sworn to before me this 26th day of March, 1932.

GILES H. PUTNAM
Court Commissioner, Waupaca Co. Wis.

171 STATE OF WISCONSIN.

CIRCUIT COURT, WAUPACA COUNTY.

Title—The Same.

NOTICE OF RETAINER.

Please Take Notice that I have been retained by the defendant, Louis Wainer, individually, in the above entitled action and demand that a copy of all papers subsequent to the summons and complaint be served upon me at my office which is 407 Insurance Building, Appleton, Wisconsin.

ELMER R. HONKAM

To: John Morgan,
Plaintiff's Attorney,
First National Bank Bldg.,
Appleton, Wisconsin.

Rec'd Dec. 13, 1935.

172 STATE OF WISCONSIN.

CIRCUIT COURT, WAUPACA COUNTY.

A. J. Blink,
Plaintiff,
vs.
Henry Wainer, J. Wainer and Louis Wainer,
Defendants.

STIPULATION.

Satisfaction of the plaintiff's claim as set forth in the complaint having been made by persons admitting responsibility therefor, which persons are not the defendants, Henry Wainer and Louis Wainer.

It Is Stipulated and Agreed, that this action be dismissed upon its merits without costs to either party.

Dated, this 17th day of November, 1932.

JOHN MORGAN,
Attorney for the Plaintiff.
ELMER R. HOUKAMP,
Attorney for Henry Wainer and Louis Wainer.

173 The counsel for the said defendants did then and there tender the bill of exceptions to the rulings, charges and opinion of the said Court, and requested that the seal of the Judge aforesaid be put to the same, according to the form of statute and rule in such cases made and provided. And thereupon the said Judge did, at the request of counsel for the said defendants, put his seal to said bill of exceptions, pursuant to the aforesaid statute in such case made and provided, this 10th day of January, A. D. 1936.

F. A. GEIGER
United States District Judge.

179 Dec. 13, 1935—NOTICE OF APPEAL, filed as follows:

DISTRICT COURT OF THE UNITED STATES.

* * (Caption) * *

Names and addresses of appellants:

Hyman Wainer, Chicago, Illinois (3622 McLean Avenue).
Louis Wainer, New London, Wisconsin.
George Davis, New London, Wisconsin.
Donald Blink, New London, Wisconsin.
Ed. Lueck, Green Bay, Wisconsin.

Names and addresses of Appellants' attorneys:

G. F. Clifford, 604 Bellin Building, Green Bay, Wisconsin.
Thomas E. Leahy, 111 E. Wisconsin Avenue, Milwaukee, Wisconsin.

180 Offense:

Count No. 1. Conspiracy to violate the revenue law and to defraud the United States by having in their possession and custody and under their control distilling apparatus set up and not registered according to law; by engaging in the business of a distiller and the business of a rectifier without giving to the Collector of Internal Revenue of the district wherein such distilling and rectifying business was to be carried on the written notice required by law; by setting up stills, boilers and other vessels to be used for the purpose of distilling without first obtaining from the Collector of Internal Revenue of the district in which such stills, boilers and other vessels were intended to be used the permit required by law;

by carrying on the business of a rectifier, the business of a wholesale liquor dealer, and the business of a wholesale dealer in malt liquors without paying the special tax and taxes as required by law; by carrying on the business of a distiller without giving the bond required by law; by engaging in and carrying on the business of a distiller with the intent, on the part of the said defendants, to defraud the United States of the tax on the spirits to be distilled by the said defendants; by making and fermenting mash, fit for distillation and for the production of spirits and alcohol, in buildings and on premises other than a distillery duly authorized according to law; by engaging in and carrying on the business of a rectifier with intent to defraud the United States of the tax on the spirits rectified, or to be rectified by them, the said defendants, and with intent to aid, abet and assist each other in defrauding the United States of the tax on distilled spirits, and by receiving the rectifying distilled spirits which had been and distilled spirits which were to be removed from a distillery to a place and places other than the distillery warehouse provided by law; and by removing and aiding and abetting in the removal of distilled spirits on which the tax had not been paid to a place and places other than the bonded warehouse or warehouses provided by law, and by concealing and
181 aiding in the concealment of distilled spirits so removed, between the dates of July 1, 1925 and May 1, 1934.

Count No. 2. In engaging in the wholesale liquor dealer business without having to pay the special tax.

Count No. 3. In concealing distilled spirits in Waupaca County on which the tax was not paid, which had been removed to a place other than the distillery warehouse.

Count No. 4. In removing and being concerned in the removal of alcohol upon which a tax was imposed by law intending to defraud the United States of such tax.

Date of Judgment:

December 9, 1935.

Brief description of judgment or sentence:

(As to the Wainers)

First count: The sentence of two years to the Federal Penitentiary at Fort Leavenworth and a fine of $10,000.

Second Count: Imprisonment for two years in the penitentiary aforesaid and a fine of $1,000.

Third Count: Imprisonment for two years in the penitentiary aforesaid and a fine of $1,000.

Fourth Count: A fine of $100.00.
George Davis—Three months and $100.00.
Ed. Lueck—Six months and $100.00.
Donald Blink—Three months and $100.00 fine.

Name of prison where now confined:

We, and each one of us of the above named appellants, hereby appeal to the Circuit Court of Appeals for the Seventh Circuit from the judgment above mentioned on the grounds set forth below.

(Sgd.) HEINIE H. WAINER
LOUIS WAINER
(ED) ERMAN LUEKE
GEORGE DAVIS
DONALD BLINK
Appellants.

182 GROUNDS FOR APPEAL.

I.

The court erred in denying the defendants' demand for a Bill of Particulars as to the first count.

II.

The court erred in denying defendants' motion for a Bill of Particulars as to the second count.

III.

The court erred in overruling the special plea in bar of Heinie Wainer.

IV.

The court erred in refusing to discharge the defendants on the third count at the close of the evidence for the reason that there was no proof that at substantially the time and place alleged in the third count, liquor was concealed.

V.

The court erred in refusing to instruct the jury in each of the following particulars:

(1) If you should find that any one of the defendants al-

leged to have been a party to the conspiracy, was a party, but that he abandoned all effort in the conspiracy and took no further part in it for a period of three years prior to the time of the return of the indictment herein, you should not find him guilty under the charge of conspiracy on file herein.

(2) Certain witnesses of the government have admitted their complicity in the crimes charged, and are known as accomplices. The testimony of such witnesses should be received with care and caution, and scrutinized carefully, and the defendants, or any one of them, should not be convicted unless the jury is satisfied that such evidence is true, and taken with all the evidence, establishes the guilt of the defendants without any reasonable doubt.

(3) The defendants, under Count 2, of the indictment, 183 are charged with carrying on the business of a wholesale dealer without having paid the special tax. If the defendants, or any one of them, were merely employed by one who did carry on such business, as a servant or employe, and were not interested as owners, they cannot be found guilty of carrying on the business as wholesale liquor dealers, and you should find them not guilty under the charge set forth in Count 2.

to which exception was taken.

VI.

The court erroneously instructed the jury as follows:

"If, on the other hand, you reach the conclusion that the proof here satisfies you, as I shall indicate to you that you should be satisfied, namely, to a moral certainty, that there was a conspiracy of the general nature described in the indictment, having the objective with respect to illicit stills and the illicit liquor business and the violation or the disregarding, rather, of the rather full regulations of the United States Government, which regulations, if not complied with, make those who fail to comply with them an offender."

to which defendants excepted.

VII.

That the court erred in admitting the record of the case of Emma Kent and Elmer Kent against Henry and Louis Wainer, together with all parts thereof, to which due exception was taken.

VIII.

That the court erred in admitting the record in the civil case of *Blink* v. *Heinie, Louis and Sam Weiner,* to which exception was duly taken.

IX.

That the court erred in admitting the testimony of Elmer Granger with reference to transactions had with Pete Bondie and statements made by Pete Bondie for the reason that at said time it was not proven that they were parties to the conspiracy and were acting in furtherance of the conspiracy.

X.

The court erred in admitting the statement of Al Tes-
184 sen made after he was through with any conspiracy and not a part to it and hearsay and not binding on the defendants, to which exception was taken.

XI.

The court erred further in refusing to discharge the defendants with the exception of Heinie Wainer for the reason that it appeared as a matter of law that they were not dealers and that they had not violated the statute in question as alleged in the second count, to which exception was duly taken.

XII.

The court erred in overruling defendants' motion for a new trial.

Endorsed: Filed Dec. 13, 1935 B. H. Westfahl, Clerk.

174 DISTRICT COURT OF THE UNITED STATES.

* * (Caption) * *

ASSIGNMENT OF ERRORS.

And now comes Heinie Wainer, Louis Wainer, George Davis, Donald Blink, and Ed Lueke, appellants, and in connection with their appeal says that in the record, proceedings, and judgment error has intervened to his prejudice, to wit:

175 I.

That the court erred in overruling the special plea in bar of Heinie Wainer, Ted Wallmer, and George Davis.

II.

The court erred in denying the defendant's demand for a Bill of Particulars as to the first count.

III.

The court erred in denying defendant's motion for a Bill of Particulars as to the second count.

IV.

The court erred in refusing to discharge the defendants on the third count at the close of the evidence for the reason that there was no proof that at substantially the time and place alleged in the third count liquor was concealed as alleged.

V.

The court erred in refusing to instruct the jury as requested as follows:

If you should find that any one of the defendants alleged to have been a party to the conspiracy, was a party, but that he abandoned all effort in the conspiracy and took no further part in it for a period of three years prior to the time of the return of the indictment herein, you should not find him guilty under the charge of conspiracy on file herein.

VI.

The court erred in refusing to instruct the jury as requested, as follows:

Certain witnesses of the government have admitted their complicity in the crimes charged, and are known as accomplices. The testimony of such witnesses should be received with care and caution, and scrutinized carefully, and the defendants, or any one of them, should not be convicted unless the jury is satisfied that such evidence is true, and taken with all the evidence, establishes the guilt of the defendants without any reasonable doubt.

176 VII.

The court erred in refusing to instruct the jury as requested, as follows:

The defendants, under Count 2, of the indictment, are charged with carrying on the business of a wholesale dealer without having paid the special tax. If the defendants, or any one of them, were merely employed by one who did carry on such business, as a servant or employe, and were not interested as owners, they cannot be found guilty of carrying on the business as wholesale liquor dealers, and you should find them not guilty under the charge set forth in Count 2.

VIII.

The court erroneously instructed the jury as follows:

"If, on the other hand, you reach the conclusion that the proof here satisfies you, as I shall indicate to you that you should be satisfied, namely, to a moral certainty, that there was a conspiracy of the general nature described in the indictment, having the objective with respect to illicit stills and the illicit liquor business and the violation or the disregarding, rather, of the rather full regulations of the United States Government, which regulations, if not complied with, make those who fail to comply with them an offender."

to which defendants excepted.

IX.

That the court erred in admitting over the objection of the defendants the record of the case of Emma Kent and

Elmer Kent against Harry and Louis Wainer, together with all parts thereof, to which due exception was taken, which record is too voluminous to place in the Assignment of Errors.

X.

That the court erred in admitting over the objection of the defendants the record in the civil case of Blink *vs.* Heinie, Louis and Sam Wainer, to which exception was duly taken, which record is too voluminous to place in the Assignment of Errors.

XI.

The court erred in admitting, over the objection of the defendants, the testimony of Elmer Granger relating to Pete Bondie and his connection with the Perky still on White
177 Lake.

XII.

The court erred in admitting over the objection of the defendants the testimony of Herbert Schroeder with reference to an agreement with Sid Freeman, and erred in refusing to strike it out for the reason that Freeman was not on trial.

XIII.

The court erred in admitting over the objection and exception of the defendants the statement of Al Tessen, made after he was through with any conspiracy to which exception was taken, which statement is too long to be incorporated in the Assignment of Errors, but the substance of said statement particularly objectionable relates to acts of the Wainers when Tessen was no part of the alleged conspiracy, or was said statement in furtherance of it.

XIV.

The court erred in receiving the whole of said statement of Al Tessen and not limiting its exception specifically to Al Tessen.

XV.

The court erred in overruling the plaintiffs' motion for a new trial and in arrest of judgment.

XVI.

That the verdict of the jury is not supported by competent evidence in the record.

XVII.

The court erred in entering judgment against the defendants upon the verdict in this case.

XVIII.

The judgment of the court is contrary to law.

Wherefore said appellants pray that said judgment of the District Court of the United States may be reversed and held for naught.

G. F. CLIFFORD,
THOMAS E. LEAHY,
Attorneys for Appellants.

178 Endorsed: U. S. District Court. * * (Caption) * * Assignments of Error. Filed Jan 11 1936 B. H. Westfahl, Clerk.

fi

18 January 2, 1936—ORDER EXTENDING TIME TO FILE BILL OF EXCEPTIONS.

UNITED STATES DISTRICT COURT.
* * (Caption) * *

January 2, A. D. 1936.

Before the Honorable F. A. Geiger, Judge.

The defendants Hyman Wainer, alias; Louis Wainer, George Davis, Donald Blink, and Ed Lueke in the above-entitled case desiring to have a bill of exceptions settled for the purpose of a writ of error,

Now, on motion of G. F. Clifford, attorney for the said defendant,

It Is Ordered: That the present term and the jurisdiction of the Court over the above-entitled cause, for the purpose of presenting and having settled a bill of exceptions,

be and the same is hereby extended until January 6, 1936; provided, however, that the proposed bill of exceptions shall be prepared and served by the party proposing the same upon the opposite party, and any proposed amendments and alterations thereof served by such opposite party, and the same submitted to the presiding Judge for settlement, within the times and in the manner provided in Rule 58 of the rules of this Court.

49 January 6, 1936—ORDER EXTENDING TIME TO FILE BILL OF EXCEPTIONS. Ente 19

UNITED STATES DISTRICT COURT.

* * (Caption) * *

January 6, A. D. 1936.

Before the Honorable F. A. Geiger, Judge.

The defendants Hyman Wainer, Alias; Louis Wainer, George Davis, Donald Blink and Ed Lueke, in the above-entitled case desiring to have a bill of exceptions settled for the purpose of a writ of error.

Now, on motion of T. R. Leahy attorney for the said defendants,

It Is Ordered: That the present term and the jurisdiction of the Court over the above-entitled cause, for the purpose of presenting and having settled a bill of exceptions, be and the same is hereby further extended until January 9, 1936, provided, however, that the proposed bill of exceptions shall be prepared, and served by the party proposing the same upon the opposite party, and any proposed amendments and alterations thereof served by such opposite party, and the same submitted to the presiding Judge for settlement, within the times and in the manner provided in Rule 58 of the rules of this Court.

Jan. 9, 50 January 9, 1936—ORDER EXTENDING TIME TO FILE BILL OF EXCEPTIONS.

UNITED STATES DISTRICT COURT.

* * (Caption) * *

January 9, A. D. 1936.

Before the Honorable F. A. Geiger, Judge.

The defendants Hyman Wainer, alias Heinie Wainer, alias Henry Wainer; Louis Wainer, Donald Blink, alias "Buck" Blink, George Davis, alias "Shorty" Davis, and Ed Lueke, in the above-entitled case desiring to have a bill of exceptions settled for the purpose of a writ of error.

Now, on motion of Thomas E. Leahy, attorney for the said defendants,

It Is Ordered: That the present term and the jurisdiction of the Court over the above-entitled cause, for the purpose of presenting and having settled a bill of exceptions, be and the same is hereby further extended until January 11, 1936, provided, however, that the proposed bill of exceptions shall be prepared and served by the party proposing the same upon the opposite party, and any proposed amendments and alterations thereof served by such opposite party, and the same submitted to the presiding Judge for settlement, within the times and in the manner provided in Rule 58 of the rules of this Court.

185 Jan. 15, 1936—Praecipe, filed as follows:

UNITED STATES DISTRICT COURT.

* * (Caption) * *

PRAECIPE.

To B. H. Westfahl, Clerk of said Court.

You Will Please include in the transcript of the record to be sent to the Circuit Court of Appeals of the United States for the Seventh Circuit, upon appeal of the defendants, Hyman Wainer, alias Heinie Wainer, Louis Wainer, et al, in the above entitled matter, the following, to-wit:

1. Indictment.

1½ Arraignment and plea of defendants.

2. Special Plea in Bar.
3. Motion for Bill of Particulars.
4. Defendant's Requested Instructions to Jury.
5. Verdict of Jury.
6. Order denying motion for new trial.
7. Sentence and judgment.
8. Motion of Defendants for new trial.
9. Orders extending time for filing bill of Exceptions.
10. Bill of Exceptions.
11. Assignment of Errors.
12. Notice of Appeal.
13. Praecipe.
14. Clerk's Certificate.

186 Counsel stipulate that the documents and exhibits specified in the foregoing Praecipe constitute the Transcript of the Record for the purpose of appeal and the physical exhibits of the respective parties, which are at present in the custody of counsel, may be retained by counsel until required for the hearing and same may be subject to inspection and correction by counsel at that time.

It Is Further Stipulated, that the original documentary exhibits of parties need not be reproduced and printed as part of the Transcript of the Record, but will be produced for the hearing.

Dated, Milwaukee, Wisconsin, this 15 day of January, 1936.

(Sgd.) E. J. KOELZER,
Asst. U. S. Atty.
Attorney for Appellee.

(Sgd.) GERALD CLIFFORD—THOS. E. LEAHY,
Attorneys for Appellants.

Received copy of the foregoing Praecipe this ..... day of January, 1936.

Approved:

.....
United States District Judge.

Endorsed: "Filed Jan. 15, 1936 B. H. Westfahl, Clerk."

187 CERTIFICATE OF CLERK.

United States of America,
Eastern District of Wisconsin. } ss.

I, B. H. Westfahl, Clerk of the District Court of the United States of America for the Eastern District of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, which are copies, with their originals now on file and remaining of record in my office, and that they are true copies of the Indictment, pleadings, judgment, and other papers and proceedings; and I further certify that hereto attached are the original assignment of errors and bill of exceptions, in the case of United States of America *vs.* Hyman Wainer, alias, et al.

In Testimony Whereof, I have hereunto set my hand, and duly affixed the seal of said Court at the City of Milwaukee, in said District, this 20th day of January, in the year of our Lord, One Thousand Nine Hundred Thirty-six, and of the Independence of the United States, the 160th.

B. H. WESTFAHL,

(Seal) *Clerk.*

[fol. 153] At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court Room, in the City of Chicago, in said Seventh Circuit on the first day of October, 1935, of the October Term in the year of our Lord One Thousand Nine Hundred and Thirty-Five and of our Independence the One Hundred and Sixtieth.

5708

HYMAN WAINER, LOUIS WAINER, GEORGE DAVIS, DONALD BLINK and ED. LUECK

vs.

THE UNITED STATES OF AMERICA

Appeal from the District Court of the United States for the Eastern District of Wisconsin

And on, to-wit: On the twentieth day of March, 1936, there was filed in the office of the Clerk of this court the opinion of the court, which said opinion is in the words and figures following, to-wit:

[fol. 154] IN THE UNITED SATTES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, OCTOBER TERM, 1935, JANUARY SESSION, 1936

No. 5708

HYMAN WAINER, LOUIS WAINER, GEORGE DAVIS, DONALD BLINK and ED. LUECK, Appellants,

vs.

THE UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for the Eastern District of Wisconsin

March 20, 1936

Before Evans and Sparks, Circuit Judges, and Lindley, District Judge

LINDLEY, District Judge:

This is an appeal from conviction upon an indictment in four counts, the first charging a conspiracy to commit

offenses against the United States, i. e.., violations of the internal revenue laws, by possessing stills not registered according to law, by engaging in the business of distiller, rectifier, and wholesale liquor dealer without complying with the law in filing bonds, obtaining permits and paying taxes and by violating the revenue laws in other particulars. The second count charged appellants with unlawfully carrying on the business of a wholesale liquor dealer without paying the tax required by law; the third with concealing and aiding in the concealment of alcohol on which tax had not been paid, and the fourth with removing or transporting alcohol upon which the tax had not been paid.

Appellants assign error upon the action of the court in overruling, as insufficient in law, a special plea to the jurisdiction, in admitting in evidence the statement of another [fol. 155] defendant on trial, in admitting certain records in civil actions, in denying a motion for a bill of particulars and in refusing to charge the jury in accordance with certain suggestions.

The special plea was one of former jeopardy and alleged that appellants had been prosecuted upon an indictment returned in May, 1932 in the United States District Court for the eastern district of Wisconsin, charging certain defendants together with certain other persons with conspiracy to violate the prohibition law by manufacturing, selling, transporting, and possessing liquor contrary to law. The certified copy of the indictment attached to the plea showed that it was returned in the western district of Wisconsin at the December Term, 1931, in the city of Madison. The trial court held the plea insufficient as a matter of law. This action must be sustained. Under Burton v. United States, 202 U. S. 344, 381, the plea was defective in that it did not aver that there had been a trial in a court having jurisdiction of the parties and of the subject matter. Unless such averment is included, such a plea is insufficient.

Further, however, we are of the opinion that there was no showing of identity of offenses, notwithstanding the provisions of the Willis-Campbell law. The record does not support a finding that the two conspiracies were identical. Rather, in the present case, it appears clearly that much of the evidence upon which appellants were convicted

came into existence after the return of the prior indictment and that many transactions have occurred, subsequent to the return of the prior indictment, sufficient to support the verdict of a jury as to the guilt of the appellants upon the new indictment. It cannot be said that because appellants were convicted of a conspiracy to violate the prohibition law, on an indictment returned in 1932, the government may not prosecute them upon a charge of conspiracy to violate the internal revenue laws, grounded largely upon events occurring long after the return of the first indictment. The plea, therefore, was defective in failing to show that the offenses were the same in law and in fact. Burton v. United States, 202 U. S. 344; Gavieres v. United States, 220 U. S. 338; Beddow v. United States, 70 Fed. (2d) 674.

The Court admitted in evidence a statement signed by defendant Tessen made on May 4, 1934, the date the indictment herein was returned. The appellants, according to the record, "excepted to the receiving in evidence of the [fol. 156] statement." The Court ruled that the statement was admissible as one made by a defendant and that it was received as such and stated that as to the defendants other than the one making the statement, it was received "subject to an appropriate instruction with respect to the same." The trial lasted several days, and in its final charge the court omitted any further reference to the limited character in which the document should be considered. But appellants made no request to the court to include this specific charge, suggested none such and preserved no exception to the failure of the court to advise the jury as to the limited manner in which they should consider the statement. The document was an admission of guilt by the particular defendant who made it. It was clearly admissible in evidence against him, and to have excluded the same would have been error upon the part of the district court. True, the statement was not to be considered so far as the other defendants were concerned, unless it was made in furtherance of the conspiracy and before the termination of the same. This fact the court recognized when admitting the statement, but appellants may not neglect their opportunity to request a specific charge as to the effect of any particular evidence and then profit by said neglect when the court can no longer comply with the re-

quest. Having neither excepted to the failure of the court to give a specific charge nor having offered or requested any such charge, the court cannot be charged with error. The fault lies with appellants themselves. Vachuda v. United States, 21 Fed. (2) 409; Schultz v. United States, 200 Fed. 234; Hughes v. United States, 231 Fed. 50 and Hallowell v. United States, 253 Fed. 865.

Furthermore, it is to be observed that the court, of its own motion, charged that acts or statements of individual defendants "are not to be considered by you as affecting any other defendant, unless you find from the evidence the existence of such conspiracy, that such other defendant was a member thereof and that the acts were done and the declarations made in pursuance of the common purpose set out in the indictment and to effectuate the same."

On the day of the trial, without previous notice, appellants presented to the court, their motion for a bill of particulars, in which they requested that the Government should advise them when each and every defendant became a part of the conspiracy, the specific act and date, and date and place of the last act of each defendant in connec-
[fol. 157] tion with the conspiracy and what part each of the defendants had in the offenses charged.

First of all, the motion for bill of particulars should have been presented diligently, before trial, and the court was justified in its discretion in denying the motion upon that ground irrespective of all others. Barnard v. United States, 16 Fed. (2d) 451.

In addition, however, the information requested was of such character as to disclose the unreasonableness of the request and the court was justified in exercising its discretion to deny the motion because of that fact. Such an application is always submitted to the sound discretion of the court, and there having been no abuse, the action should not be disturbed. Wong Tai v. United States, 273 U. S. 77; Knauer v. United States, 237 Fed. 8.

Appellants complain of the refusal to give a requested instruction to the effect that as to the offense charged in count two, if any of the defendants were merely employed by one who did carry on the business of distiller, as a servant and employee and not as owner, they could not be found guilty of carrying on such business. This offense was based upon Section 193 of Title 26 of U. S. C. A. which

provides for the punishment of one "who shall carry on the business of a rectifier, wholesale liquor dealer * * * without having paid the special tax." Section 550, Title 18 of the U. S. C. A. provides that "whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

Obviously a servant will aid and abet another in the carrying on of such business and become a principal if, with knowledge of the business, its purpose and its effect, he consciously contributes his efforts to its conduct and promotion, however slight his contribution may be. Thus, the court could not have followed the law and given the charge requested. Mayer v. U. S., 259 Fed. 216.

Appellants requested the court to charge the jury that the testimony of accomplices should be received with caution and scrutinized carefully. The court refused so to do, and error is assigned. Had the court not included in its charge, full discussion of the subject matter and principles relating to credibility and weight of evidence the refusal would have been erroneous. But the court had said to the jury that some of the testimony introduced had come from [fol. 158] persons who were themselves guilty of illegal acts and they had admitted upon the stand their wrongdoing. It was explained to the jury that such testimony was received, for the purpose of showing through such witnesses, the character of the persons charged with situations wherein these guilty persons committed their acts. He advised the jury that the fact that they were self-convicted of their wrong-doing and the fact that they may have been accomplices in the doing of the things that are charged in the indictment against the defendants were to be considered as bearing upon their credibility. He advised the jury that the fact that a witness is an accomplice and confesses his participation in the wrongful act does not destroy his right to attempt to tell the truth, but that his testimony should be approached open-mindedly, and the weight to be given thereto determined from careful consideration. The court, in framing a charge upon the elements bearing upon credibility of witnesses is not to be bound to a hard and fast formula as to each and every phase of his charge. It is his duty to explain to the jury that they are the judges of the credibility of the witnesses, as the court here indi-

cated, and to charge them that each and every circumstance appearing in evidence, bearing upon the credibility of any witness, is to be considered in connection with the testimony of that witness in order that the jury may come to a fair determination as to what weight shall be given to the testimony. This the trial court did. In Caminetti v. United States, 242 U. S. 470 the trial court refused a similar instruction and the Supreme Court approved the action, the subject matter having been covered in the general charge.

There is no requirement that any specifically framed charge be given, if the general charge includes fair, comprehensive instructions upon the subject matter involved. Ruby v. United States, 61 Fed. (2d) 617; United States v. Woods, 66 Fed. (2d) 262; United States v. Becker, 62 Fed. (2d) 1007.

Appellants complain also because the court refused to give in the specific language requested, a charge to the effect that if any defendant abandoned the conspiracy more than three years prior to the return of the indictment, he should be found not guilty. The court advised the jury that the conspiracy must have been in existence within three years prior to May, 1934, and that a defendant, to be guilty, must have been engaged in the conspiracy within that period before there could be any conviction. He told the jury explicitly that proof that any particular defendant consciously, understandingly and with knowledge participated [fol. 159] in an act to be accomplished by the conspiracy, and did so with the consciousness that he was participating in the furtherance of the common design, was essential to a conviction. The inevitable meaning of his charge upon this subject matter was that before a defendant could be convicted, the proof must show that he was consciously engaged in the conspiracy charged within three years prior to the return of the indictment. Under the authorities previously quoted, there was no error in refusing the additional charge requested.

The court admitted the records of two civil actions against certain of the appellants, in corroboration of certain testimony. These records were relevant only upon the question of whether certain defendants were liable civilly for injuries to certain premises, either as lessees thereof or otherwise. In our opinion, it is not necessary to determine whether this evidence was properly admitted, for the reason that all the facts disclosed by the admitted records

had been shown in evidence by testimony of various witnesses prior to the admission of the exhibits. None of this testimony was objected to. It was in all its substantial parts uncontradicted. The admission of the records added nothing thereto, and in no wise prejudiced appellants. We cannot consider abstract questions of law. We are to determine only whether prejudice has resulted from erroneous admission of testimony. This is a practical question and where other and similar uncontradicted evidence is received without objection no prejudice can exist. Williams v. U. S., 265 Fed. 625.

Various other criticisms of the court's charge are made, and appellants attack the sufficiency of the indictment. No exceptions were preserved in any of the respects now suggested, nor was there any demurrer to the indictment or motion to quash. However, we have examined the record to ascertain whether any prejudice has resulted to appellants in any of the respects suggested by counsel. We find none.

Accordingly the judgment is

Affirmed.

[fol. 160] And on the same day, to-wit: On the twentieth day of March, 1936, the following further proceedings were had and entered of record, to-wit:

Before Hon. Evan A. Evans, Circuit Judge; Hon. William M. Sparks, Circuit Judge; Hon. Walter C. Lindley, District Judge

5708

HYMAN WAINER, LOUIS WAINER, GEORGE DAVIS, DONALD BLINK and ED. LUECK

vs.

THE UNITED STATES OF AMERICA

Appeal from the District Court of the United States for the Eastern District of Wisconsin

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Wisconsin, and was argued by counsel.

On consideration whereof: It is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

And afterwards, to-wit: On the seventh day of April, 1936, there was filed in the office of the Clerk of this court a petition for rehearing, which said petition for rehearing is in the words and figures following, to-wit:

[fol. 161] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, OCTOBER TERM, A. D. 1935

No. 5708

HYMAN WAINER, LOUIS WAINER, GEORGE DAVIS, DONALD BLINK and ED. LUECK, Appellants,

vs.

THE UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for the Eastern District of Wisconsin

Honorable Ferdinand A. Geiger, Judge Presiding

PETITION FOR REHEARING BY APPELLANTS

May it please the Court:

Your petitioners, Hyman Wainer, Louis Wainer, George Davis, Donald Blink and Ed Lueck, respectfully request a rehearing herein and the reconsideration by the Court on all the facts and matters involved. Your petitioners call particular attention of the Court to the fact that, due to the [fol. 162] severe snow storms occurring during the early part of the month of February, it was impossible for all the counsel for the defendants to get together, and that by reason thereof two briefs were filed for your petitioners, the appellants, namely, one brief under the signature of Messrs. Dougherty, Jennings and Keating, and another brief under the signature of Messrs. Dougherty, Clifford and Leahy. This Court on the hearing hereof stated that it wanted all the law it could get in this matter, but an examination of the

opinion reveals that the Court must have completely ignored the former of the two briefs, to which the attention of the Court is now respectfully directed.

We believe the two briefs together completely refute the position of the Government in this case, and give ground for a reconsideration and reversal of the opinion given in this case on all points. We, however, wish to stress particularly the following points:

I

This Court has ruled that the admission of the statements of Al Tessen was not reversible error, and that the failure to limit it by the instruction to the particular defendant making it lies with the appellants for failing to ask for such instruction.

We respectfully submit to this Court that it has been held in the long line of decisions, and particularly by this Circuit Court in the case of Collenger v. the U. S., 50 Fed. (2nd) 345, and by the Supreme Court of the United States in Logan v. the U. S., 144 U. S. 263, 36 Law Ed. 429, and Brown v. U. S., 150 U. S. 93, 14 Supreme Court 37, 37 Law Ed. 1010, that while acts committed and statements made by the [fol. 163] conspirator in furtherance of the conspiracy were and during the course of the conspiracy admissible as against all the conspirators, it is elementary that the statement of a conspirator, in order to bind the co-conspirator, must be a statement not made in the formation of the conspiracy, but after the conspiracy is formed and in furtherance of its object. It is then admissible against all upon the theory that each then speaks and acts for all if speaking or acting in furtherance of the object of the conspiracy.

The above cases further hold that statements made after the conspiracy had ended were but narratives of past events and in no respect attributable to the conspiracy. Such statements were purely hearsay and inadmissible as to all the defendants save those who made them.

The Court in its opinion herein, in discussing the admission of the Tessen statement, said:

"The Court admitted in evidence a statement signed by defendant Tessen made on May 4, 1934, the date the indictment herein was returned. The appellants, accord-

ing to the record, 'excepted to the receiving in evidence of the statement.' The Court ruled that the statement was admissible as one made by a defendant and that it was received as such, and stated that as to the defendants, other than the one making the statement, it was received 'subject to an appropriate instruction with respect to the same.' The trial lasted several days, and in its final charge the Court omitted any further reference to the limited character in which the document should be considered. But appellants made no request to the Court to include this specific charge, suggested none such, preserved no excep- [fol. 164] tion to the failure of the Court to advise the jury as to the limited manner in which they should consider the statement. The document was an admission of guilt by the particular defendant who made it. It was clearly admissible in evidence against him, and to have excluded the same would have been error upon the part of the District Court. True, the statement was not to be considered so far as the other defendants were concerned, unless it was made in furtherance of the conspiracy and before the termination of the same. This fact the Court recognized when admitting the statement, but appellants may not neglect their opportunity to request a specific charge as to the effect of any particular evidence and then profit by said neglect when the Court can no longer comply with the request. Having neither excepted to the failure of the Court to give a specific charge nor having offered or requested any such charge, the Court cannot be charged with error. The fault lies with appellants themselves. Vachuda v. United States, 21 Fed. (2) 409; Schultz v. United States, 200 Fed. 234; Hughes v. United States, 231 Fed. 50, and Hallowell v. United States, 253 Fed. 865."

Counsel for the defendants did everything that was required of them at the time the Tessen statement was offered in evidence. They objected to its admission as to all persons other than the defendant Tessen and moved to strike it. The Court denied the defendants' motions. To refresh the Court's recollection may we call the Court's attention to what actually happened as shown by the record on transcript page 93:

"Mr. Clifford: Now, your Honor, I want to move to strike out all portions of that statement that involve any

[fol. 165] other defendant other than Al Tessen for the reason that the statement was made after the conspiracy was through, at a time when he was doing nothing in the performance of it, and it is not binding as far as the statements against these conspirators are concerned, and for the further reason that many of the statements contained in that are pure hearsay statements and conclusions.

The Court: The motion will be denied.

Mr. Clifford: May I have an exception to that?

Mr. Koelzer: The man who made that statement is one of the defendants here?

The Witness: He is.

Mr. Koelzer: We will offer that in evidence if the Court please.

Mr. Clifford: I don't understand there is to be an offer of the statement for the same reasons that I have just mentioned.

The Court: The statement is receivable in evidence as the statement made by one of the defendants and it is received as such, and as to the defendants other than the one giving the statement, with an appropriate instruction with respect to it.

Mr. Clifford: May we have an exception on the accepting of the statement itself?

(The statement referred to was marked 'Exhibit 5,' and received in evidence.)"

We thoroughly agree with the Court that the trial of this case lasted several days and in its final charge the Court omitted any further reference to the limited character in which the document should be considered. However, we cannot agree with that part of the opinion which reverses the Collenger Case by requiring the defendants, in order to save their rights, to ask for further instructions regard-[fol. 166] ing the limited nature of the objected testimony. We respectfully submit that the Collenger Case expounds the only sound theory of law on the subject. We respectfully call the attention of the Court to the language of this Court in the Collenger Case (page 349) where a situation exactly like the present one was under consideration.

"Error is assigned on the admission in evidence of statements of different ones of the alleged conspirators to government agents who testified thereto, and the failure of

the Court to limit such evidence to the particular defendants who made the statements. Special Agent Lease testified for the government that shortly before the indictment was returned defendant Orta signed a statement offered in evidence. The statement is in the form of an affidavit, setting forth that Orta had for three years been proprietor of a place in Indiana Harbor; that in July, 1928, he accompanied Mendez, an alleged conspirator named but not indicted, to his place of business, where Orta was then told that he (Orta) would be required to purchase his liquor from Mendez, and that it would cost $100 for protection from the police; that he paid Mendez $100 cash, and afterwards $50, and for several months bought liquor from Mendez, but, on discontinuing such purchases, was arrested by the police.

"Upon offering this statement in evidence it was objected that it was incompetent as to any defendant except Orta. The Court ruled that it would be admitted, and the jury was instructed not to consider it as evidence against any other defendant unless they found that the statement was made at a time when the conspiracy existed as charged in the indictment, and at a time when the defendant making the statement was one of the conspirators. It [fol. 167] was then further charged that, in order to be admissible against the others, it would have to appear that it was made in furtherance of the conspiracy. The Court said: 'That might be the law. I am not clear on that. * * * I will give that instruction now. I may change it if I find it is not the law. I will accept your suggestion. Let that instruction go to the jury also. With that instruction the exhibit may be admitted and read to the jury.'

"The exhibit was then read to the jury, and thereupon counsel for defendants stated to the Court that it then appeared the statement was but a narration of past events, and moved that the Court then instruct the jury that it was no evidence against any defendant except Orta. The Court said: 'The request is denied.' Exception was taken by defendants.

"I is elementary that a statement of a conspirator, in order to bind the co-conspirator, must be a statement not made in the formation of the conspiracy, but after the conspiracy is formed, and in furtherance of its objects. It is then admissible against all upon the theory that each then speaks and acts for all, if speaking or acting in furtherance

of the objects of the conspiracy. It is too plain for discussion that this statement to the government agent, far from furthering the conspiracy, was made after the conspiracy had ended, and with the purpose of exposing it and penalizing the conspirators, and was hearsay as to all the defendants except Orta. *When, therefore, the statement had been received in evidence, the Court's attention was then called to it by the motion to limit, it was the duty of the Court then and there unequivocally to limit its application strictly to the defendant who made the statement. Where* [fol. 168] *there are many defendants on trial charged with a general conspiracy, each is subjected to the hazard of being injuriously affected by alleged acts or statements of some other defendants, incompetent as to all but the ones making the statements. In such situations courts should be ever alert to minimize, so far as possible, the hazard to defendants whom the law does not bind by such statements.*

"When this statement appeared in evidence—inadmissible as to all defendants except Orta, and so pregnant with harm to others on trial—on the motion then made to exclude it as to the others, the duty so to limit its application was immediate and unmistakable. The statement was peculiarly harmful to those defendants who were connected with the police force—the Mayor, chief, and officers Zarkovich and Ramey. It recites the payment of money for police protection, and indicated a conspiracy which had manifested itself by the arrest of Orta as soon as he stopped buying liquor of Mendez.

"A similar question arises as to the testimony of federal agents who identified a statement to them of defendant Grice Chandler, purporting to have been signed and sworn to by him August 17, 1929, in the presence of five special agents of the Federal Department of Justice. After the Court had deleted certain parts of the statement, the rest of it was offered and received in evidence. The statement is, in substance, that, since coming to Indiana Harbor, Chandler had been involved in maintaining gambling houses and a house of prostitution, and in selling liquor in violation of federal and state laws; that in 1926 he opened a house, paying Tom Johnson (a coconspirator, dead) $100 a day for the privilege of running it, and was told by Johnson that as long as he paid it was all right, and as soon as he [fol. 169] quit he would be 'knocked off'; that he did quit

and was immediately 'knocked off'; that he paid until September, 1926, when he was told to close, and did so, remaining closed until the fall of 1928; that in the interval he was in partnership with Cap White (a defendant on trial), running a crap game and selling booze, and paying $200 a week to Johnson, who promised protection; that in September, 1928, he opened another place, but before doing so he had to see Collenger, 'who had taken Johnson's place as collector'; that Collenger said if Chandler paid him $250 a week it would insure protection against raids by local police; that just before the November, 1928, election Collenger and Chandler had a disagreement over the amount to be paid, and Chandler told him that he (Collenger) had been 'starving me and my wife too long.'

"The government freely admits that Chandler's statement was not made in furtherance of the conspiracy. It reflected severely upon the members of the police department.

"*The government contends that, if there was right at that time to have the jury instructed as requested, the right was waived through the colloquy.*

"*The right to have such incompetent and harmful evidence promptly excluded, as against those to whom it has no proper application; is plain; but, if it be assumed that the right in this instance was waived by the failure of counsel to call attention to it upon the general charge to the jury, the waiver is not applicable to the Orta statement, nor to other similar items of evidence admitted over objection, or retained through denial of motions to exclude made immediately after they were received.*

"Government Agent Turrou, who testified he was present [fol. 170] when Chandler made the statement, related a conversation with Chandler in the Chicago Federal Building on the same date, which was very much to the same effect as the Chandler statement. At the conclusion of his testimony it was moved by all the defendants except Chandler that the jury be instructed to consider Turrou's evidence as against no other defendant than Chandler, for the reason that it appears what Chandler said was a narration of past events, and not a declaration in furtherance of the conspiracy, and not made in the presence of any other of the defendants. This motion the Court denied, and exception was taken.

"Government witness and Agent Lyle testified to very much the same effect, and the motion on the part of the other defendants to strike it as to them because not made in their presence nor in furtherance of the conspiracy was denied by the Court.

"A written statement of defendant Overall, made to Government agents nearly three months after the return of the indictment, was to the effect that in 1925 Overall had a talk with defendant Hale, when the latter was candidate for Mayor, in which Hale said that he would take care of Overall and Chandler for four years if they would support him; that Overall could have Broadway, Chandler Parish avenue, and Cap White Pennsylvania avenue; that later a man told Overall he could get him policy protection; but that, after he (Overall) refused to pay, he was raided by the Police Department, although before that he had not been raided.

"The Court denied motion of the defendants other than Overall to exclude the statement as evidence against them. Manifestly this statement also had no possible relation to the conspiracy, and was hearsay as to the defendants mak- [fol. 171] ing the motion to exclude. The statement was severely harmful to Hale, and reflected strongly upon the other defendants connected with the Police Department. As to all of them it should have been excluded, with such admonition to the jury as would tend to minimize its harmful influence upon those defendants against whom it afforded no degree of competent evidence.

"*It is contended for the government that whatever of error there may have been in the admission in evidence of the statements and testimony of conversations, or the failure to limit their application, was obviated or cured by that part of the courts general charge at the close of all the evidence, which was: 'I instruct the jury that the statements of coconspirators are admissible if made during the conspiracy and in furtherance of the object of the conspiracy and are admissible as against all persons who are in the conspiracy, but that these statements are not to be used for the purpose of establishing the existence of the conspiracy itself.'*

"*This charge, in effect, put it up to the jury to decide whether the statements and evidence were admissible against the complaining defendants. This was a function of the court, not of the jury. The statements and conversa-*

tions were but narratives of past events, in no respect attributable to the conspiracy. They were purely hearsay, and inadmissible as to all the defendants save those who made them. It was for the court to pass upon their admissibility, and indeed it did so pass—in overruling objections to their admissibility against the objecting defendants or in denying motions, made after they were received in evidence, to so limit their application. These rulings closed the matter so far as the objecting defendants were con-
[fol. 172] *cerned, and they were not thereafter required to seek further ruling by the court in order to avail of any error in the rulings thereon already made. As we have above suggested, such evidence should on objection or motion have been rejected or stricken out as to the other defendants, when it was evident that it was but hearsay. That was the least the court could have done to protect defendants against whom the statements and evidence were not competent from the serious menace of their influence. The charge given is the statement of a mere abstract principle of law which the jury was quite unqualified to apply to the many defendants and to the many instances of the reception of such evidence in the course of this lengthy trial.*

"Had the charge specifically pointed out that this or that statement received in evidence, or this or that evidence of what a given defendant had related to the witness, was incompetent and not to be used against specifically named defendants, it might perhaps have served sufficiently to have neutralized the virus of the improper admission or refusing to strike. This we need not decide, since the charge given did not serve to guide the jury as to what evidence should be rejected.

"The failure to exclude or limit this evidence may indeed account for Collenger's conviction, apparently upon such a statement alone, concededly incompetent as to him. If such incompetent evidence served to convict him, the mass of evidence of the same kind, improperly received as to other of the defendants, in all probability tended materially to influence the result as to them." (Emphasis ours.)

This Court has cited, in support of its opinion on this [fol. 173] point, numerous cases, none of which, we submit, are in point with the instant case, either on the law or on the record. In Hallowell v. United States, 253 Fed. 865, the objected testimony were letters written by one of the

conspirators to an intended victim of the conspiracy, and in furtherance of the conspiracy; moreover the objection thereto was a general objection, not like the objection in the instant case, which sought to limit, rather than to exclude, the objectionable testimony. In Schultz v. United States, 200 Fed. 234, the Court admitted statements of the defendant himself, not of the coconspirator, made subsequent to the commission of the alleged offense, which tended, however, to show in the said defendant guilty knowledge and criminal intent in the commission of the original offense itself. In Vachuda v. United States, 21 Fed. (2) 409, the witnesses for the Government testified that the defendant Vachuda, after having been placed under arrest, received at the place from which he conducted his business a telephone call from a coconspirator to whom he had referred as the "boss." At the trial an objection was made to this testimony in so far as it referred to the alleged coconspirator, and on appeal Vachuda sought the benefit of the objection taken for the other alleged coconspirator. The Court held that, the objection being only to the other conspirator, could not be urged upon appeal for the defendant who had made the statement. In Hughes v. United States, 231 Fed. 50, some of the appellants raised for the first time on appeal as error the failure of the Court to charge the jury upon the effect of circumstantial evidence, and upon other questions of law pertinent to the issue. There it was held that the Court cannot be put in error for [fol. 174] failing to charge a legal principle, in the absence of a request to do so. The obvious distinction between the case cited and the instant case before the bar of this Court is that in the instant case the Court admitted, over objection and without limitation, the evidence, the effect of which should have been limited solely as to the defendant making it, and that, therefore, if the prejudice thereof is at all curable, should have been cured by the Court with an appropriate instruction right at the time the statement and evidence was admitted.

The Court further in its opinion herein has the following to say:

"Furthermore, it is to be observed that the Court, of its own motion, charged that acts or statements of individual defendants 'are not to be considered by you as affecting any other defendant, unless you find from the evidence the

existence of such conspiracy, that such other defendant was a member thereof and that the acts were done and the declarations made in pursuance of the common purpose set out in the indictment and to effectuate the same.' "

Again we call the Court's attention to the opinion of this Court in the Collenger Case, supra, page 349, where this Court said, under exactly similar conditions, the following:

"*The charge given is the statement of a mere abstract principle of law which the jury was quite unqualified to apply to the many defendants and to the many instances of the reception of such evidence in the course of this lengthy trial.*" (Emphasis ours.)

[fol. 175] If that was the law in the Collenger Case, counsel for the defendants had a right to depend upon it, and we must respectfully insist that this Court now cannot state the law differently, unless it intends to change the whole law and the whole procedure in this circuit.

This Tessen statement goes to every count in the indictment. Its admission in evidence flies in the very teeth of the opinion in the Collenger Case, and if it was improperly admitted the conviction as to every count should be reversed.

II

The Court has stated in its opinion that the plea of former jeopardy was defective in that it did not aver that there had been a trial in a court having jurisdiction of the parties and of the subject matter. The record shows a special plea (Tr. 11), accompanied by Exhibit A (Tr. 13), which exhibit is a certified copy of the indictment returned in the District Court of the United States for the Western District of Wisconsin against the defendants making the said plea, in which plea they allege that they had been tried under the said indictment, convicted thereunder and suffered the punishment imposed thereby. We respectfully submit to the Court, first, that this adequately states that the defendants in the instant case were the same who in the prior case had stood trial, been convicted and suffered punishment; and, secondly, the court below, by the mere reading of the certified copy of the indictment, was upon judicial notice that

the United States District Court for the Western District of Wisconsin had, under the facts alleged in the said certi- [fol. 176] fied copy of the indictment, jurisdiction of the above parties and the subject matter.

III

Petitioners respectfully call attention of this Court to the point raised in appellants' brief under the signature of Messrs. Dougherty, Jennings and Keating (pages 68, 69 and 70), which calls attention to the following facts:

Count 2 charges that on or about the 1st day of March, 1933, at the City of New London, in the Counties of Waupaca and Outagamie, Wisconsin, etc., the identical persons named in the first count of the indictment carried on the business of a wholesale liquor dealer, without having paid the special tax, etc.

In the case of Bailey v. U. S., 5 Fed. (2d) 437, on page 438, the Circuit Court of Appeals for the Fifth Circuit said:

"The special tax imposed upon wholesale liquor dealers by R. S. 3244 was repealed by the National Prohibition Act. Lipke v. Lederer, 239 U. S. 557, 42 Sup. Ct. 549, 65 L. Ed. 1061; Fontenot v. Accardo (C. C. A.), 278 Fed. 871. We are of the opinion that the section just mentioned has not been reenacted, and, as contended by the defendants, there is no tax not in effect upon wholesale liquor dealers. It therefore may be assumed that the last subdivision of the indictment does not state an offense."

We urge that this is a correct statement of the law, in view of Section 5 of the Willis-Campbell Act, enacted November 23, 1921, and which is now Section 3 of Title 27, [fol. 177] U. S. C. A., and which is as follows:

"All laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force on October 28, 1919, shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provision of this title, and if any act is a violation of any such laws and also of

this title a conviction for such act or offense under one shall be a bar to prosecution therefor under the other."

We further urge as to this count that not only has the section of the statute under which this count is drawn been repealed, but that there is no evidence anywhere in the record that shows that any of the present defendants were wholesale liquor dealers or were persons required to pay the special tax as wholesale liquor dealers in manner and form as charged in this count of the indictment; that is to say, there was no proof that on or about the 1st day of March, 1933, any of these present defendants engaged in or carried on the business of a wholesale liquor dealer at the City of New London, in the Counties of Waupaca and Outagamie, Wisconsin.

We call the Court's attention to the fact that this very vital point was completely ignored by the Court in formulating its opinion in this case.

IV

Petitioners respectfully call attention of the Court to the aforesaid appellants' brief (pages 70, 71), wherein they call attention to the following:

[fol. 178] Count 3 charges that on or about the 26th day of April, 1933, at Waupaca County, Wisconsin, etc., * * * on a farm about four miles north of New London, Waupaca County, Wisconsin, the same persons named in the first count of the indictment did conceal and aid in the concealment of distilled spirits, to wit, alcohol, the exact quantity of said alcohol being to the grand jurors unknown, and on which said distilled spirits the tax had not been paid, which said spirits had been removed to a place other than a distillery warehouse provided by law.

In the case of United States v. One Marmon Automobile, 5 Fed. (2d) 113, on page 115, the Court specifically held that Revised Statute 3296, Section 404, Title 26, U. S. C. A., shall be confined to licensed distilleries and other established warehouses.

There is no allegation in the count that the defendants, or any of them, were licensed distillers or bonded warehousemen, or that the goods alleged to have been removed or concealed were removed from a licensed distillery or a

bonded warehouse. This statute is clearly directed against a particular class, licensed distillers and bonded warehousemen, who by their particular relation to the United States Government are in a position to defraud the United States Government of its lawful revenue. This section was never intended to apply to illicit distillers or warehousemen.

In order to protect itself against all persons other than the class above cited, who remove or deposit or conceal in any place with intent to defraud the United States taxes, the Congress has seen fit to enact Revised Statute 3450, Section 1181, Title 26, U. S. C. A.

[fol. 179] It is further pointed out to the Court therein that there is a total lack of proof that any of the liquor alleged to have been removed or concealed by the defendants was not tax paid. This proof is material and necessary if a conviction is to be sustained under count 3 of the indictment. It could have been very simply proved on the part of the Government by showing that the packages or containers of the alleged untaxed liquor did not bear upon them appropriate stamps evidencing tax payments. No such proof was offered, nor was any proof of any other kind offered in its stead. Mickle v. United States, 33 Fed. (2d) 584.

Again we call the Court's attention to the fact that these questions were entirely ignored by the Court in its opinion herein.

V

The Court states in its opinion on pages 5 and 6:

"Appellants complain also because the Court refused to give in the specific language requested, a charge to the effect that if any defendant abandoned the conspiracy more than three years prior to the return of the indictment, he should be found not guilty. The Court advised the jury that the conspiracy must have been in existence within three years prior to May, 1934, and that a defendant, to be guilty, must have been engaged in the conspiracy within that period before there could be any conviction. He told the jury explicitly that proof that any particular defendant consciously, understandingly and with knowledge participated in an act to be accomplished by the conspiracy, and did so with the consciousness that he was participating in the fur-

[fol. 180] therance of the common design, was essential to a

conviction. The inevitable meaning of his charge upon this subject matter was that, before a defendant could be convicted, the proof must show that he was consciously engaged in the conspiracy charged within three years prior to the return of the indictment."

We respectfully submit to this Court that such is not the inevitable meaning of the charge upon the subject matter. The recondite and abstruse flow of legal verbiage from the lips of the trial judge might conceivably lead a learned Court of Appeals to infer such meaning from the charge. It might also lead an equally learned Court to the inference that this is a charge upon participation in—rather than the abandonment of—a conspiracy. It is most emphatically not an understandable instruction of law to an ordinarily intelligent jury for their adequate guidance in the determination of the question of fact. Again we direct the attention of this Court towards the Collenger Case (supra, page 349), where this Court said:

"The charge given is the statement of a mere abstract principle of law which the jury was quite unqualified to apply to the many defendants and to the many instances of the reception of such evidence in the course of this lengthy trial."

Conclusion

In this petition for rehearing we have only attempted to call the Court's attention to that which we believed were the more flagrant omissions and errors. We again urge, however, everything urged in appellant's original briefs. We respectfully insist that the opinion herein and the opin-
[fol. 181] ion in the Collenger Case cannot stand together as the law in this circuit. There is direct conflict between them. We further respectfully insist that we are entitled to rulings on the other questions of law, and repeal, and construction of statutes, which we called to the attention of the Court in the appellants' original briefs, as well as in this petition; for all of which petitioners respectfully pray that they may be granted a rehearing.

Respectfully submitted, John E. Dougherty, Irwin S. Rubelle, Attorneys for Appellants.

[fol. 182] And afterwards, to-wit: On the Seventeenth day of April, 1936, the following further proceedings were had and entered of record, to-wit:

Before Hon. Evan A. Evans, Circuit Judge; Hon. William M. Sparks, Circuit Judge; Hon. Walter C. Lindley, District Judge

5708

HYMAN WAINER, LOUIS WAINER, GEORGE DAVIS, DONALD BLINK and ED. LUECK

vs.

THE UNITED STATES OF AMERICA

Appeal from the District Court of the United States for the Eastern District of Wisconsin

It is ordered by the court that the petition for a rehearing in this cause be, and the same is hereby denied.

And afterwards, to-wit: On the twenty-first day of April, 1936, the following further proceedings were had and entered of record, to-wit:

Before Hon. Evan A. Evans, Circuit Judge; Hon. William M. Sparks, Circuit Judge

5708

HYMAN WAINER, LOUIS WAINER, GEORGE DAVIS, DONALD BLINK and ED. LUECK

vs.

THE UNITED STATES OF AMERICA

Appeal from the District Court of the United States for the Eastern District of Wisconsin

Now this day comes counsel for appellants and presents a motion for a stay of the mandate of this court, pending a petition to the Supreme Court of the United States for a writ of certiorari.

[fol. 183] On consideration whereof: It is now here ordered that the mandate in this cause be, and the same is hereby stayed until the further order of this court.

It is further ordered that counsel for appellee proceed with diligence and promptly file the petition for a writ of certiorari in the Supreme Court of the United States and forthwith file in this court proof of the filing of said petition in said court.

And on the same day, to-wit: On the twenty-first day of April, 1936, there was filed in the office of the Clerk of this court a præcipe for record, which said præcipe is in the words and figures following, to-wit:

IN THE UNITED STATES CICRUIT COURT OF APPEALS, SEVENTH CIRCUIT

No. 5708

HYMAN WAINER, LOUIS WAINER, GEORGE DAVIS, DONALD BLINK and ED. LUECK

vs.

UNITED STATES OF AMERICA

To the Clerk of the United States Circuit Court of Appeals for the Seventh Judicial Circuit;

PRÆCIPE FOR RECORD

SIR:

You will please prepare a record in the above entitled case for use in the Supreme Court of the United States on application for a writ of certiorari, the same to include the following:

1. Printed Record.
2. Opinion and judgment of the court.
3. Petition for rehearing, and order denying same.
4. Order staying mandate.

John E. Dougherty, Irwin S. Rubelle, Attorneys for Appellants.

Endorsed: Filed April 21, 1936, Frederick G. Campbell, Clerk.

[fol. 184] UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SEVENTH CIRCUIT.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten and printed pages, numbered from 1 to 31, inclusive, contain a true copy of the proceedings had and papers filed, made in accordance with the præcipe for record, filed on the twenty-first day of April, 1936, excepting item 1 of said præcipe, being the printed record, which is certified herewith under a separate certificate, in the case of Hyman Wainer, Louis Wainer, George Davis, Donald Blink and Ed. Lueck, Appellants, vs. The United States of America, Appellee, No. 5708, October Term, 1935, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 22nd day of April A. D. 1936.

Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit. (Seal United States Circuit Court of Appeals, Seventh Circuit.)

[fol. 178] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 1, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted, limited to the question whether the statute upon which the second count of the indictment is based was repealed and has not been reenacted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FILED
MAY 8 1936
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. [redacted] 51

HYMAN WAINER, LOUIS WAINER, GEORGE DAVIS, ET AL.,

Petitioners,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HARRY C. HEYL,
IRWIN S. RUBELLE,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 1003

HYMAN WAINER, LOUIS WAINER, GEORGE DAVIS, DONALD BLINK AND ED. LUECK,

Petitioners,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Hyman Wainer, Louis Wainer, George Davis, Donald Blink and Ed. Lueck, respectfully pray that a writ of certiorari issue to review a decision of the Circuit Court of Appeals for the Seventh Circuit, affirming the conviction of your petitioners in the United States District Court for the Eastern District of Wisconsin.

I.

Short Statement of the Case.

These petitioners, together with others, were indicted in the District Court as aforesaid, on an indictment returned May 4, 1934, of four counts, of which count 1 (R. 2-6) charged the defendants with conspiracy (Appendix 1) to violate various sections of the Liquor Revenue Laws of the United States; count 2 (R. 6-7) charged the same defendants with carrying on the business of wholesale liquor dealers without having paid the special tax as required by law (Appendix 2); count 3 (R. 7-8) charged them with concealing and aiding in the concealment of distilled spirits, on which the tax had not been paid, which said spirits had been removed to a place other than a distillery warehouse provided by law (Appendix 3); and count 4 (R. 8-9) charged them with removing and being concerned in the removal of distilled spirits "to a place and from a place to the grand jurors unknown," on which distilled spirits the requisite taxes had not been paid.

The petitioners, Hyman Wainer and George Davis, together with the defendant Ted Wallmer, filed their special plea in bar (R. 11-12), showing they had previously been convicted under an indictment charging a conspiracy to violate the National Prohibition Law, which indictment—set out in full as their Exhibit "A" (R. 13-19)—charged an offense arising out of the same acts committed at the same times and in the same places as charged in the instant prosecution. This plea was overruled (R. 10), and the petitioners, together with the other defendants, then stood trial.

At the trial the Government introduced the statement of a co-conspirator, Al Tessen (Exhibit 5, R. 27-30 and 89-92), made after the termination of the conspiracy and

by way of narration of past events, implicating the petitioners who—by counsel—objected (R. 93) to admissibility of the statement as against them, and moved to strike therefrom all such portions as referred to them. The objection and motion were overruled, the trial court saying (R. 93) that the statement would go in with an appropriate instruction; no such instruction was given.

The Government introduced evidence of civil litigation between some of the petitioners and strangers to the instant suit (R. 38-41, 42-45, Government Exhibit 3, R. 127-134, and Government Exhibit 4, R. 135-140), whereby it sought to connect the petitioners with premises where equipment for manufacture of illicit liquor had been seized; petitioners' objections to the admissibility of this evidence was overruled (R. 44, 45). Thereafter, throughout the course of the trial no proof was introduced by the Government that the petitioners or any one of them had carried on the business of wholesale liquor dealer; there was no proof introduced by the Government that any of the petitioners had committed or procured, or aided in, the commission of any of the acts alleged within more than three years prior to the return of the indictment; there was no evidence whatever offered by the Government to make proof or raise the presumption that any of the distilled spirits seen or seized in connection with the entire case was not tax paid.

On behalf of the defendants, the evidence (R. 94-116) indicated non-participation in the conspiracy and good character and reputation on the part of the petitioner Louis Wainer; and of abandonment of the conspiracy and subsequent non-participation in any of the acts thereafter by the petitioner Hyman Wainer for more than three years prior to the return of the indictment. At the close of all the evidence, petitioners asked for an instruction, among others (Exhibit A, I, R. 25) on the effect of abandonment of con-

spiracy and subsequent non-participation for more than three years prior to the return of the indictment, which instruction was refused by the court. And thereafter, upon the finding of guilty, the court sentenced the petitioners, Hyman Wainer and Louis Wainer, to imprisonment in the United States penitentiary for a term of two years and a fine of $10,000 each on the first count, to a term of two years and a fine of $1,000 each on each of the second and third counts, and a fine of $100 each on the fourth count, the sentences to serve consecutively, making a total term of imprisonment of six years and a total fine of $12,100 each for the two above-named petitioners (R. 32). The petitioner Ed. Lueck was sentenced to imprisonment in the house of correction for a term of six months and to pay a fine of $100, and the petitioners George Davis and Donald Blink were sentenced each to a term of imprisonment in the house of correction for three months and to pay a fine of $100.

II.

Statement of Matters Involved and the Grounds Relied Upon for Granting of Writ of Certiorari.

The discretionary power of this Court to grant a writ of certiorari is invoked on the following grounds:

First. The decision of the court below that a conviction for conspiracy to violate the National Prohibition Laws is not, under Section 3, Title 27, U. S. C. A. (Appendix 4), a bar to prosecution for conspiracy to violate the Internal Revenue laws for the same acts, is in conflict with the decisions of this Court in *La Franca* v. *U. S.*, 282 U. S. 568, 75 L. Ed. 551, and *Ex-parte Nielsen,* 131 U. S. 76, 33 L. Ed. 118.

Second. The holding of the court below that the statement of the co-conspirator, made after the termination of

the conspiracy and by way of narration of past events, is admissible as to the other defendants, over their objection, in disregard of their motion to strike from the statement such portions as refer to them, and without any instruction to limit the effect of such statement strictly to the defendant making it, is in conflict with the opinion of the same court in *Collenger* v. *United States,* 50 F. (2d) 345, 348, and with the Circuit Court of Appeals for the 10th Circuit in *Minner* v. *United States,* 57 F. (2d) 506, 511, the Circuit Court of Appeals for the 8th Circuit in *Lane* v. *United States,* 34 F. (2d) 413, 416; *Morrow* v. *United States,* 11 F. (2d) 256, 259, and *Gerson* v. *United States,* 25 F. (2d) 49, 55, 56, as well as the holding of this Court in *Brown* v. *United States,* 150 U. S. 93, 14 S. Ct. 37, 37 L. Ed. 1010.

Third. There is a conflict of opinion in the various Circuit Courts of the United States as to whether or not Section 193, Title 26, U. S. C. A., R. S. 3244, imposing a special tax for carrying on the business of wholesale liquor dealer (charged to have been violated by count 2) has been reenacted by Section 3, Title 27, U. S. C. A. (formerly called Section 5 of Willis-Campbell Act). In *Bailey* v. *United States,* 5 F. (2d) 437, the Circuit Court of Appeals for the Fifth Circuit held that Section 193 had been repealed and not reenacted. In *Foreman* v. *United States,* 28 F. (2d) 768, the Circuit Court of Appeals for the Eighth Circuit held that this section had been repealed, but was revived by the Willis-Campbell Act. In *Murphy* v. *United States,* 38 F. (2d) 441, the Circuit Court of Appeals for the Seventh Circuit, to which this writ is sought, held "what sections of the old Internal Revenue Law were or were not reenacted by that act (U. S. C. A., Title 27, Section 3) were not considered (referring to *U. S.* v. *Stafoff,* 260 U. S. 480, 43 S. Ct. 199, 67 L. Ed. 358) so that we have the question

as to the scope of the Willis-Campbell Act wholly unconsidered in either the *Stafoff* or *Remus* case."

Fourth. By sustaining the conviction of the petitioners on count 3, charging violation of Section 404, Title 26, U. S. C. A., this Court came into express conflict with the holding in *United States* v. *One Marmon Automobile,* 5 F. (2d) 113, wherein it was held that R. S. 3296, Section 404, Title 26, U. S. C. A., applies to licensed distillers and other established warehouses, wherefore—in order to establish uniformity of opinion throughout the United States—it is urged that this Honorable Court construe the aforesaid statute.

Fifth. By sustaining conviction on all counts, the court below held that in a prosecution of this type there is no duty on the Government to prove that any of the distilled spirits in question were not tax paid, nor that there is any duty even to raise such presumption, as by showing that containers of over five gallons lack stamps or other marks indicating tax payment; this is in conflict with the holding of the Circuit Court of Appeals for the Eighth Circuit in *Mickle* v. *United States,* 33 F. (2d) 684, 685.

WHEREFORE your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Seventh Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court had in the case numbered and entitled on its docket No. 5708, Hyman Wainer, Louis Wainer, George Davis, Donald Blink and Ed. Lueck, petitioners, *vs.* The United States of America, respondent, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United

States; and that the judgment herein of said Circuit Court be reversed by the Court, and for such further relief as to this Court may seem proper.

HYMAN WAINER,
LOUIS WAINER,
GEORGE DAVIS,
DONALD BLINK,
ED. LUECK,
By HARRY C. HEYL,
IRWIN S. RUBELLE,
Their Attorneys.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of Courts Below.

The opinion of the Circuit Court of Appeals for the Seventh Circuit (not yet reported) appears in full in the record (R. 153). No formal opinion was rendered by the District Court.

II.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by Act of February 13, 1925, Section 347, Title 28, U. S. C. A.

III.

Statement of Case.

A full statement of the case having been made in the petition for the writ of certiorari, it is omitted here for the sake of brevity.

IV.

Specifications of Error.

I. The Circuit Court of Appeals erred in sustaining the overruling of the special plea of the petitioners Hyman Wainer, George Davis and the defendant Ted Wallmer.

II. The Circuit Court of Appeals erred in sustaining the admission of the statement of a co-conspirator, made after the termination of the conspiracy, and by way of narration of past events, as against the other defendants.

III. The Circuit Court of Appeals erred in sustaining conviction on count 2, for that Section 193 of Title 26, U. S. C. A., charged by count 2 to have been violated, had been repealed by the National Prohibition Act and has not been reenacted.

IV. The Circuit Court of Appeals erred in sustaining conviction on count 3, for that Section 404 of Title 26, U. S. C. A., charged by count 3 to have been violated, applies solely to licensed distillers and bonded warehousemen, there being no charge in the indictment or evidence in the record putting any of the petitioners in that classification.

V. The Circuit Court of Appeals erred in sustaining the admission of evidence and records of civil litigation between some of the petitioners and strangers to this suit.

VI. The Circuit Court of Appeals erred in sustaining the conviction on every count in the indictment, for that there was no evidence whatever that any of the distilled spirits seen or seized in this case was illicit, or not tax-paid, or lacked stamps or other marks evidencing tax payment.

VII. The Circuit Court of Appeals erred in sustaining the refusal to instruct the jury as to the effect of the evidence indicating abandonment of the conspiracy for more than three years prior to the return of the indictment.

V.

Argument.

(I) The special plea of the petitioners Hyman Wainer, George Davis and the defendant Ted Wallmer should have been allowed. The special plea of these defendants set up their conviction under the National Prohibition Act on an indictment which was set out in full, and the reading of

which indictment showed that the offenses in that and in the present indictment were identical in time, place and transaction. Under the authority of Section 3 of Title 27, formerly known as Section 5 of the Willis-Campbell Act, these petitioners were immune to further prosecution. In a very similar situation, this Court, in the case of *La Franca* v. *U. S.*, 75 L. Ed. 551, 282 U. S. 568, said:

> "Respondent already had been convicted and punished in a criminal prosecution for the identical transactions set forth as a basis for recovery in the present action. *He could not again, of course have been prosecuted criminally for the same acts.* * * * (Italics are ours.)
>
> "To hold that the acts of respondent in question were not violations of these preceding laws as amended, as well as of the National Prohibition Act, would be to give a narrow and strained application to this provision of the Willis-Campbell Act, and to raise the very doubts in respect of its constitutionality which we are bound to avoid if reasonably it can be done."

And in *Ex parte Nielsen*, 131 U. S. 176, 33 L. Ed. 118, this Court on a somewhat similar question said, on page 122:

> "The test is not, whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense."

In view of the foregoing authorities, the position of the trial court that the Willis-Campbell Act applies to convictions for violations of the prohibition laws, or the revenue laws, but not to *conspiracies* to violate either of them, seems a straining of technicalities to the breaking point.

(II) The statement of Al Tessen, a co-conspirator, made after the termination of the conspiracy, and by way of narration of past events, without limiting the effect of the

statement strictly to the defendants making it, is inadmissible as to the other defendants.

The Circuit Court of Appeals for the Seventh Circuit, by sustaining the admission of such statement reversed its own former ruling by it made in *Collenger* v. *United States*, 50 F. (2d) 345.

> "When, therefore, the statement had been received in evidence, the Court's attention was then called to it by the motion to limit, it was the duty of the Court then and there unequivocally to limit its application strictly to the defendant who made the statement. Where there are many defendants on trial charged with a general conspiracy, each is subjected to the hazard of being injuriously affected by alleged acts or statements of some other defendants, incompetent as to all but the ones making the statements. In such situations courts should be ever alert to minimize, so far as possible, the hazard to defendants whom the law does not bind by such statements.
>
> "When this statement appeared in evidence—inadmissible as to all defendants except Orta, and so pregnant with harm to others on trial—on the motion then made to exclude it as to the others, the duty so to limit its application was immediate and unmistakable."

and further in the same case, relative to the duty of the Court to limit the effect of the statement without any further motions on the part of the defendant that Court goes on to say:

> "The government contends that, if there was right at that time to have the jury instructed as requested, the right was waived through the colloquy.
>
> "The right to have such incompetent and harmful evidence promptly excluded, as against those to whom it has no proper application, is plain; but, if it be assumed that the right in this instance was waived by the failure of counsel to call attention to it upon the general charge to the jury, the waiver is not applicable

> to the Orta statement, nor to other similar items of evidence admitted over objection, or retained through denial of motions to exclude made immediately after they were received."

By reversing itself on the *Collenger* case, the Circuit Court of Appeals brought its decision into conflict with the various other circuits and with the holding of this Court in *Brown* v. *United States,* 150 U. S. 93, 14 S. Ct. 37, 37 L. Ed. 1010, where this Court citing its own decision in *Logan* v. *U. S.,* 144 U. S. 263, said:

> "But only those acts and declarations are admissible under this rule, which are done and made while the conspiracy is pending, and in furtherance of its object. After the conspiracy has come to an end, whether by success or by failure, the admissions of one conspirator by way of narrative of past facts, are not admissible into evidence against the others."

In the Eighth Circuit, the Circuit Court of Appeals in *Lane* v. *U. S.,* 34 F. (2d) 413, at pages 415, 416, says:

> "The admission of this testimony seems to be violative of the most elementary rules of evidence. The testimony elicited was palpably hearsay, unless it was admissible on the theory that it constituted the declaration of a co-conspirator. It was not made in the presence of the defendants on trial; it constitutes no part of the *res gestae,* and, if it be conceded that a conspiracy between Cushman and the defendants had been established, certainly there was nothing to show that these statements by Cushman were made during the existence of any such conspiracy. They apparently constituted a narrative of past events by which the declarant sought to exculpate himself and inculpate his co-defendants, and they were not made in furtherance of the conspiracy or common design."

The Circuit Court of Appeals for the Eighth Circuit consistently held to the same rule of law in *Morrow* v. *United*

States, 11 F. (2d) 256, and *Gerson* v. *United States*, 25 F. (2d) 49. That is also the position taken by the Circuit Court of Appeals for the Tenth Circuit in *Minner* v. *U. S.*, 57 F. (2d) 506, and by the Circuit Court of Appeals for the Fourth Circuit in *Hauger* v. *United States*, 173 Fed. 54. This presents a clear conflict of decisions between the various circuits, as well as a departure from the law as laid down by this Court.

(III) There is a conflict of opinion in the various Circuit Courts of the United States as to whether Section 193, Title 26, U. S. C. A. (R. S. 3244), has been reenacted by Section 3, Title 27, U. S. C. A. The first mentioned statute is charged to have been violated in count 2 of the indictment herein. The Circuit Court of Appeals for the Fifth Circuit, in *Bailey* v. *U. S.*, 5 F. (2d) 437, held that this statute, providing for a special tax for wholesale liquor dealers, was repealed by the National Prohibition Act and not reenacted by Section 3, Title 27, U. S. C. A. (formerly known as Section 5 of the Willis-Campbell Act). The Circuit Court of Appeals for the Eighth Circuit in *Foreman* v. *U. S.*, 30 F. (2d) 768, held that this statute had been repealed by the National Prohibition Act but was revived by the Willis-Campbell Act. The Circuit Court of Appeals for the Seventh Circuit, to which this Writ of Certiorari is sought, in *Murphy* v. *United States*, 38 F. (2d) 441, held:

> "What sections of the old Internal Revenue Law were or were not reenacted by that Act (U. S. C. A., Title 27, Section 3) is not considered (referring to *U. S.* v. *Stafoff*, 260 U. S. 480) so that we have the question as to the scope of the Willis-Campbell Act wholly unconsidered in either the Stafoff or the Remus case."

Your petitioners respectfully urge that the position taken by the Circuit Court of Appeals for the Fifth Circuit, in

Bailey v. *U. S. (supra)*, is the more consistent with logic and sound judicial precedent, and should be so declared by this Honorable Court.

(IV) Section 404, Title 26, U. S. C. A. (R. S. 3296), on which conviction was sustained on count 3, is applicable only to licensed distilleries and their established warehouses, and is without effect as to the present petitioners, who are neither alleged nor proven to belong in that category.

The United States District Court for the Northern District of Georgia, in *U. S.* v. *One Marmon Automobile*, 5 F. (2d) 113, said on page 115:

> "Cognate provisions as to distilled liquors are found in R. S. 3296 (Comp. St. 6038), prohibiting the removal of them before the tax is paid to a place other than the distillery warehouse, or the concealment of them when so removed or the removal of them from a warehouse in an unlawful manner, or concealment of them when so removed. There is no specific intent required in this statute, but felony punishments are imposed for the acts denounced. No forfeiture of vehicle is provided. R. S. 3296, seems appropriate to and should be confined to licensed distilleries and their established warehouses. R. S. 3450, with its broader provisions and lighter penalties, may well cover illicit stills and their products, and it has so been always held in this District."

This statute was clearly intended as a special restriction against a specially licensed set of tax payers, and was never intended to have any application to "bootleggers," for whom—as the above court points out, R. S. 3450 was particularly intended.

We respectfully submit that this Honorable Court should construe the statute in question and determine and clarify its applicability.

(V) Admitting over defendants' objections evidence and records of civil litigation between them and strangers to this suit, is reversible error.

The statement of this proposition hardly needs authority to support it as a clear elementary principle of law. Its effect was prejudicial. Exception was duly taken (R. 45) on the ground that such evidence was irrelevant and immaterial. In the case of the *United States* v. *Satuloff Bros.*, 79 F. (2d) 846, the exact question arose. The Circuit Court of Appeals for the Second Circuit, held:

> "Judgments and decrees rendered in civil suits are inadmissible in evidence in criminal prosecutions as proofs of any facts determined by said judgments or decrees, and the reason for the rule as stated has been that the parties are different and that the quantum of proof required in one case, is different from that required in another."

By sustaining the admission of such evidence and records of such civil litigation in the instant case the Circuit Court of Appeals for the Seventh Circuit established a rule of law in direct conflict with that announced by the Circuit Court of Appeals for the Second Circuit in the case above cited. We respectfully submit to this Honorable Court that the ruling in the *Satuloff* case is the correct way and should be so enunciated by this Court.

(VI) No conviction can be sustained on any count of this indictment in the absence of proof that any of the distilled spirits seen or seized in the instant case were not tax paid.

The evidence in this case proceeded throughout the trial exactly as in cases under the old Prohibition Laws. The mere mention of the words "alcohol," "liquor," "distilled spirits," etc., etc., apparently carried the presumption of illegality. But throughout the entire trial there is not a

scintilla of evidence that any of the distilled spirits in the instant case were not tax paid. Proof could very easily have been made by the Government by a mere showing that the containers, most of which were large drums, did not bear upon them stamps evidencing tax payments. No such evidence nor any other kind was offered by the Government. By sustaining the conviction in this case the Circuit Court of Appeals for the Seventh Circuit comes into direct conflict with the Circuit Court of Appeals for the Eighth Circuit, which said in *Mickle* vs. *United States*, 33 F. (2d) 684, 685—

> "Of the crime charged in the first count of this indictment there are three elements: First, the spirits removed must have been spirits on which the tax has not been paid; second, removal must have been from a distillery; third, removal must have been to a place other than a bonded warehouse provided by law. Of the crime charged in the second count of the indictment also there are three elements: First, the spirits concealed must have been spirits on which the tax was not paid. Second, they must have been concealed by the defendant; third, they must have been spirits which had been removed from a distillery. Of the several elements of the two crimes charged, all of which must be proved before the crimes are proved, the fact that the tax on the spirits involved had not been paid may be said to be the most essential element. Certainly it is a necessary element, and certainly the crimes charged are not proved unless it is proved that on the spirits involved the tax had not been paid."

and again in the same case on the same page the court goes on to say:

> "Prior to national prohibition it was entirely lawful to have in one's possession and to transport distilled spirits of less than five gallons in a container bearing no stamps. No provision of the Law required stamps

to be affixed to containers of less than five gallons of distilled spirits. See Sections 266, 332, 335, Title 26, U. S. Code (26 U. S. C. A., 266, 332, 335)."

(VII) Refusal by the Court to instruct on the effect of abandonment of a conspiracy by a conspirator, in clear and unequivocal language, is prejudicial error.

The Circuit Court of Appeals in its opinion in this case on that point said (R. 158):

> "Appellants complain also because the Court refused to give in the specific language requested, a charge to the effect that if any defendant abandoned the conspiracy more than three years prior to the return of the indictment, he should be found not guilty. The Court advised the jury that the conspiracy must have been in existence within three years prior to May, 1934, and that a defendant, to be guilty, must have been engaged in the conspiracy within that period before there could be any conviction. He told the jury explicitly that proof that any particular defendant consciously, understandingly and with knowledge participated in an act to be accomplished by the conspiracy, and did so with the consciousness that he was participating in the furtherance of the common design, was essential to a conviction. The inevitable meaning of his charge upon this subject matter was that, before a defendant could be convicted, the proof must show that he was consciously engaged in the conspiracy charged within three years prior to the return of the indictment."

We respectfully submit to this Court that such is *not* the inevitable meaning of the charge upon the subject matter. The recondite and abstruse flow of legal verbiage from the lips of the trial judge might conceivably lead a learned Court of Appeals to infer such meaning from the charge. It might also lead an equally learned Court to the

inference that this is a charge upon participation in—rather than the abandonment of—a conspiracy. It is most emphatically not an understandable instruction of law to an ordinarily intelligent jury for their adequate guidance in the determination of the question of fact. We direct the attention of this Court towards the *Collenger* case, 50 F. (2d) 34, where the same Circuit Court said:

> "The charge given is the statement of a mere abstract principle of law which the jury was quite unqualified to apply to the many defendants and to the many instances of the reception of such evidence in the course of this lengthy trial."

Conclusion.

It is submitted that for the reasons stated the Writ of Certiorari should be granted.

Respectfully submitted,

HARRY C. HEYL,
IRWIN S. RUBELLE,
Attorneys for Hyman Wainer,
Louis Wainer, George Davis,
Donald Blink, Ed. Lueck.

APPENDIX.

Sec. 88, Title 18, U. S. C. A.

1. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Sec. 193, Title 26, U. S. C. A.

2. Any person who shall carry on the business of a rectifier wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquor, retail dealer in malt liquor, or manufacturer of stills without having paid the special tax as required by law shall for every such offense be fined not less than $100 nor more than $5,000 and imprisoned not less than 30 days nor more than 2 years. And all distilled spirits or wines, and all stills or other apparatus, fit or intending to be used for the distillation or rectification of spirits, or for the compounding of liquors, owned by such person, wherever found and all distilled spirits or wines and personal property found in the rectifying establishment or in any building, room, yard, enclosures connected therewith, and used with or constituting a part of the premises shall be forfeited to the United States.

3. Sec. 404, Title 26, U. S. C. A.

Removal or Concealment of Spirits Contrary to Law.—Whenever any person removes, or aids or abets in the removal of any distilled spirits on which the tax has not been paid, to a place other than the bonded warehouse provided by law, or conceals or aids in the concealment of any spirits so removed, or removes, or aids or abets in the removal of any distilled spirits from any distillery warehouse, or other warehouse for distilled spirits authorized by law, in any manner other than is provided by law, or conceals or aids

in the concealment of any spirits so removed he shall be liable to a penalty of double the tax imposed on such distilled spirits so removed or concealed, and shall be fined not less than $200 nor more than $5,000, and imprisoned not less than three months nor more than three years.

4. Sec. 3, Title 27, U. S. C. A.

All laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force on October 28, 1919, shall be and continue in force, as to both beverage and non-beverage liquor, except such provisions of such laws as are directly in conflict with any provision of this title; but if any act is a violation of any of such laws and also of this title, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other.

FILED
SEP 16 1936
CHARLES ELMORE CROPLEY

Supreme Court of the United States.

OCTOBER TERM, 1936.

No. 51.

HYMAN WAINER, LOUIS WAINER, GEORGE DAVIS et al.,
Appellants,
vs.
THE UNITED STATES OF AMERICA,
Appellee.

BRIEF AND ARGUMENT FOR APPELLANTS.

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vs.
THE UNITED STATES OF AMERICA,
Appellee.

BRIEF AND ARGUMENT FOR APPELLANTS.

MAY IT PLEASE THE COURT:

The appellants here stand convicted of a violation of Section 1397, Title 26, U. S. C. A. (R. S., Sec. 3281; Feb. 8, 1875, c. 36, Sec. 1C, 18 Stat. 310), the second count of this indictment (to which this appeal is limited) charging:

May 4, 1934—**Indictment**, filed as follows:

"In the District Court of the United States of America
for the Eastern District of Wisconsin.

"At a regular term of the District Court of the United States of America for the Eastern District of Wisconsin, to wit, at the regular January Term thereof in the year of our Lord One Thousand Nine Hundred and Thirty-four, held at the City of Milwaukee, in said Eastern District of Wisconsin.

"Second Count.

"And the Grand Jurors aforesaid, upon their oath aforesaid, further present:

"That on or about the first day of March, in the year nineteen hundred and thirty-three, at the City of New London, in the Counties of Waupaca and Outagamie, Wisconsin, in the Eastern District of Wisconsin and with the Internal Revenue District of Wisconsin and within the jurisdiction of this court,

Hyman Wainer, alias Heine Wainer, alias Henry Wainer,

Sam Wainer,

Louis Wainer,

Pete Bondie, alias Pete Blondie, alias Mr. Jackson, alias Dr. Leland C. Asay, alias Ed Gerson,

August Becker,

Earl Blink,

Donald Blink, alias 'Buck' Blink,

Charles Christenson, alias Charles Christianson,

Ervin Dorschner, alias Abe Dorschner,

Sid Freeman,

Floyd Granger,

Ed Lueke,
Merle Ravey,
Ed Rossey, alias Ed Rosey, alias Ed Rossi,
Gus Rossey, alias Gus Rosey, alias Gus Rossi,
Louis Sasse,
Howard Siats, alias 'Doc' Siats,
Adolph Siebold,
John Trambar,
Alfred Tessen, alias Al Taustin, and
Theodore Wallmer, alias Ted Wallmer,

the identical persons named in the first count of this indictment, did then and there wilfully, unlawfully and feloniously engage in carrying on the business of a wholesale liquor dealer without having paid the special tax as required by law, within the intent and meaning of the Internal Revenue Laws of the United States of America; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America."

This Court has granted certiorari to review the question whether the statute on which the said second count of the indictment is based was repealed and has not been re-enacted.

The section of the law last quoted is as follows:

"Section 1397. Penalties and forfeitures. (a) Rectifiers, liquor dealers, dealers in malt liquors, and manufacturers of stills—(1) Nonpayment of special tax. Any person who shall carry on the business of a rectifier, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquors, retail dealer in malt liquors, or manufacturer of stills without having paid the special tax as required by law shall, for every such offense, be fined not less than $100 nor more than

$5,000 and imprisoned not less than thirty days nor more than two years. And all distilled spirits or wines, and all stills or other apparatus, fit or intended to be used for the distillation or rectification of spirits, or for the compounding of liquors, owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery or rectifying establishment, or in any building, room, yard, or enclosure connected therewith and used with or constituting a part of the premises, shall be for feited to the United States" (R. S., Sec. 3281; Feb. 8, 1875, c. 36, Sec. 16, 18 Stat, 310).

POINTS AND AUTHORITIES.

Substantial issues relied upon are as follows:

1. This law was repealed by the adoption of the Eighteenth Amendment to the Constitution of the United States and the adoption of the National Prohibition Act.

U. S. v. Yuginovich, 256 U. S. 450, 65 L. Ed. 1043, 41 S. Ct. 551.

2. If it has been re-enacted at all it is only by reason of the enactment of the Act of Congress of November 23, 1921 (Willis-Campbell Act), which statute is set out in its entirety in Appendix 1.

U. S. v. Stafoff, 260 U. S. 477, 67 L. Ed. 358;
U. S. v. Remus, 260 U. S. 477, 67 L. Ed. 358.

What sections of the old internal revenue laws were or were not re-enacted by that Act was wholly unconsidered in either the Stafoff or the Remus case.

Murphy v. United States, 38 F. (2d) 441.

3. Section 1397 above cited is in direct conflict with the National Prohibition Act, and the Act supplemental to the National Prohibition Act and was not re-enacted by the provisions of the Act supplemental to the National Prohibition Act.

Bailey v. U. S., 5 F. (2d) 437.

4. Whatever old internal revenue statutes have been re-enacted by the act supplemental to the National Prohibition Act were re-enacted not as revenue provisions, but as

penal provisions in aid of enforcement of national prohibition, and therefore have been rendered inoperative by adoption of the Twenty-first Amendment to the United States Constitution repealing the Eighteenth Amendment and all laws enacted thereunder.

Lipke v. Lederer, 259 U. S. 557, 66 L. Ed. 106;
Fontenot v. Accardo, 278 Fed. 871;
United States v. Chambers, 291 U. S. 217, 54 S. Ct. 434, 78 L. Ed. 763.

ARGUMENT.

Section 1 of the Eighteenth Amendment to the Constitution of the United States is as follows:

> "After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited."

1. On October 28, 1919, Congress passed the National Prohibition Act, which provided, among other things, the following:

Section 3, Title 2, National Prohibition Act (Section 12, Title 27, U. S. C. A.—

> "Manufacture, sale, transportation, importation or exportation, delivery, furnishing, or possessing intoxicating liquors prohibited; exceptions. No person shall manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this chapter, and all the provisions of this chapter shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.
>
> "Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished and possessed, but only as herein provided, and the commissioner may, upon application, issue permits therefor: Provided, That nothing in this chapter shall prohibit the purchase and sale of warehouse receipts covering distilled spirits on deposit in Government bonded warehouses, and no special tax liability shall attach to the business of

purchasing and selling such warehouse receipts" (Oct. 28, 1919, c. 85, Title II, Sec. 3, 41 Stat. 308).

Section 25, Title 2, National Prohibition Act (Section 39, Title 27, U. S. C. A.)—

"Unlawful possession of liquor or property designed for manufacture thereof; search warrants. It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this chapter or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in sections 434 to 454, and 456 of Title 17, and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the Court may make thereof. If it is found that such liquor or property was so unlawfully held or possessed, or had been so unlawfully used, the liquor, and all other property designed for the unlawful manufacture of liquor, shall be destroyed, unless the Court shall otherwise order. No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house. The term 'private dwelling' shall be construed to include the room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel, or boarding house. The property seized on any such warrant shall not be taken from the officer seizing the same on any writ of replevin or other like process" (Oct. 28, 1919, c. 85, Title II, Sec. 25, 41 Stat. 315).

Section 29, Title 2, National Prohibition Act (Section 46, Title 27, U. S. C. A.)—

"Punishment for unlawful manufacture or sale of

liquor or violation of permits. Any person who manufactures or sells liquor in violation of this chapter shall for a first offense be fined not more than $1,000, or imprisoned not exceeding six months, and for a second or subsequent offense shall be fined not less than $200 nor more than $2,000 and be imprisoned not less than one month nor more than five years.

"Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this chapter, or violates any of the provisions of this chapter, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500; for a second offense not less than $100 nor more than $1,000, or be imprisoned not more than ninety days; for any subsequent offense he shall be fined not less than $500 and be imprisoned not less than three months nor more than two years. It shall be the duty of the prosecuting officer to ascertain whether the defendant has been previously convicted and to plead the prior conviction in the affidavit, information, or indictment. The penalties provided in this chapter against the manufacture of liquor without a permit shall not apply to a person for manufacturing nonintoxicating cider and fruit juices exclusively for use in his home, but such cider and fruit juices shall not be sold or delivered except to persons having permits to manufacture vinegar" (Oct. 28, 1919, c. 85, Title II, Sec. 29, 41 Stat. 316).

Congress afterwards amended this section of the act by providing that upon conviction persons were liable to a sentence in the penitentiary for a term not to exceed five years or a fine of not more than $10,000, or both, and still later amended it to provide for other and different penalties, all of which penalties were different from the penalties provided in Section 1397 of Title 26, U. S. C. A.

And Section 35, Title 2, National Prohibition Act (Section 52, Title 27, U. S. C. A.)—

"Repeal: liquor taxes and penalties. All provisions of law that are inconsistent with this chapter are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This chapter shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve anyone from criminal liability, nor shall this chapter relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws" (Oct. 28, 1919, c. 85, Title II, Sec. 35, 41 Stat. 317).

This Court held that the provisions of that act, outlawing as it did the manufacture, transportation, sale and possession of intoxicating beverages, together with the provision for lesser and special penalties for failing to pay the special taxes in double the amount previously payable, together with additional penalties, repealed all prior internal revenue laws upon intoxicating beverages.

U. S. v. Yuginovich, 256 U. S. 540, 65 L. Ed. 1043, 41 S. Ct. 551.

2. The Act supplemental to the National Prohibition Act (set out in Appendix 1) re-enacted all laws in regard to the manufacture and taxation of intoxicating liquor, and all penalties for violations of such laws that were in force

when the National Prohibition Act was enacted, except such provisions of such laws as were in direct conflict with any provision of the National Prohibition Act or of the Act supplemental to the National Prohibition Act, but what sections were thus re-enacted remained wholly unconsidered in either the Remus case or the Stafoff case.

U. S. v. Stafoff, 260 U. S. 477, 67 L. Ed. 358;
Murphy v. United States, 38 F. (2d) 441.

Section 5 of the Act supplemental to the National Prohibition Act (Section 3, Title 27, U. S. C. A.), which was held in the Stafoff and Remus cases, above cited, to have re-enacted the provisions of previous revenue laws regarding intoxicating beverages, did not, by its terms, state which sections were re-enacted, but merely provided that those provisions that were not in direct conflict with the National Prohibition Act were to be and remain in force. The case did not consider which particular sections were or were not in such direct conflict (Murphy v. United States, 38 F. [2d] 441), but merely decided that the former provisions contained in section 52, title 27, which had previously repealed all former revenue laws that were merely inconsistent with the National Prohibition Act, was superseded by Section 3, Title 27, U. S. C. A., which restored all statutes not in direct conflict.

3. It was held in Bailey v. United States, 5 F. (2d) 437, that the tax imposed upon wholesale liquor dealers, which had been repealed by the National Prohibition Act, had not been re-enacted, although the reasons for this holding are not stated in the opinion. An examination of that section and its cognate provisions makes the conclusion in the former case logically inevitable. The section in question reads:

"Section 1397. Penalties and forfeitures. (a) Rectifiers, liquor dealers, dealers in malt liquors, and manufacturers of stills—(1) Nonpayment of special tax. Any person who shall carry on the business of a rectifier, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquors, retail dealer in malt liquors, or manufacturer of stills without having paid the special tax as required by law shall, for every such offense, be fined not less than $100 nor more than $5,000 and imprisoned not less than thirty days nor more than two years. And all distilled spirits or wines, and all stills or other apparatus, fit or intended to be used for the distillation or rectification of spirits, or for the compounding of liquors, owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery or rectifying establishment, or in any building, room, yard, or enclosure connected therewith and used with or constituting a part of the premises, shall be forfeited to the United States" (R. S., Sec. 3281, Feb. 8, 1875, c. 36, Sec. 16, 18 Stat. 310).

The due date of the payment of this tax was provided by Section 186, Title 26, U. S. C. A. (now replaced by Section 1402, Title 26, U. S. C. A.), which is as follows:

"Section 186. When due; returns. All special taxes shall become due on the 1st day of July in each year, or on commencing any trade or business on which such tax is imposed. In the former case the tax shall be reckoned for one year; and in the latter case it shall be reckoned proportionately, from the 1st day of the month in which the liability to a special tax commenced to the 1st day of July following. It shall be the duty of special taxpayers to render their returns to the deputy collector at such times within the calendar month in which the special tax liability commenced as shall enable him to receive

such returns, duly signed and verified, not later than the last day of the month, except in cases of sickness or absence, as provided for in section 97 of this title" (Oct. 1, 1890, c. 1244, Sec. 53, 26 Stat. 624).

Reading these two sections together, the imposition of the tax, and the provision how and when it is to be paid, is shown at once to be in direct and irreconcilable conflict with all the provisions of the National Prohibition Act and the Act supplemental to the National Prohibition Act above cited. When it is seen that Section 12, Title 27, prohibits the manufacture, sale or possession of intoxicating liquor, Section 39 abolishes all property right therein and Section 52 specifically renders impossible of performance the provisions of the former revenue law by making it unlawful to sell the stamps in advance, and making the tax assessable in double the amount only after evidence of the commission of an illegal act, it becomes clear that this section could not have been re-enacted because of direct conflict with the National Prohibition Act. If the term "direct conflict" has any significance, it means impossibility of simultaneous co-existence. A statute which renders it impossible to accept a special tax and issue the stamp therefor in advance in the commission of an act rendered by it unlawful, is necessarily in direct conflict with a former law requiring a special tax in advance for the performance of such acts previously sanctioned by law.

4. Whatever old internal revenue statutes re-enacted by the act supplemental to the National Prohibition Act were re-enacted not as revenue provisions, but as penal provisions in aid of enforcement of national prohibition, and therefore have been repealed by adoption of the Twenty-first Amendment to the United States Constitution repeal-

ing the Eighteenth Amendment and all laws enacted thereunder.

> Lipke v. Lederer, 259 U. S. 557, 66 L. Ed. 106;
> Fontenot v. Accardo, 278 Fed. 871.

The prosecution in the instant case proceeded on the theory that the provisions of the Willis-Campbell Act (Appendix 1) and particularly Section 5 thereof (Section 3, Title 27, U. S. C. A.), restored the former revenue statutes on intoxicating liquor as such. But such position is clearly untenable in view of the act itself, as well as of the Eighteenth Amendment to the United States Constitution then in force. These statutes were originally passed under the authority of the taxing power conferred upon Congress by the Constitution of the United States, and the Government derived large revenue from taxing the manufacture and sale of intoxicating beverages, but as is pointed out by Mr. Justice Day in United States v. Yuginovich, this policy was radically changed by the adoption of the Eighteenth Amendment to the said Constitution. The Court says, 256 U. S. 450, bottom of page 459:

> "The Eighteenth Amendment in comprehensive and clear language prohibits the manufacture or sale of intoxicating liquors in the United States for beverage purposes, and confers upon Congress the power to enforce the Amendment by appropriate legislation. To this end, Congress passed a national prohibition law known as the Volstead Act, 41 Stat. at L. 305, chap. 83. It is a comprehensive statute intended to prevent the manufacture and sale of intoxicating liquors for beverage purposes."

The subsequent provisions of the law were clearly not intended to raise revenue but to lay additional burdens in

the nature of penalties upon unlawful manufacture. The mere use of the word "tax" does not preclude the fact that it was a penalty laid only after the evidence of the commission of a crime. This Court, in Lipke v. Lederer, 259 U. S. 557, 66 L. Ed. 1061, says:

> "The mere use of the word 'tax' in an act primarily designed to define and suppress crime is not enough to show that, within the true intendment of the term, a tax was laid. Child Labor Tax Case (May 15, 1922) (259 U. S. 20, ante, 817, 21 A. L. R. 1432, 42 Sup. Ct. Rep. 449). When by its very nature the imposition is a penalty, it must be so regarded. Helwig v. United States, 188 U. S. 605, 613, 47 L. Ed. 614, 617, 23 Sup. Ct. Rep. 427. Evidence of crime (Section 29) is essential to assessment under Section 35. It lacks all the ordinary characteristics of a tax, whose primary function 'is to provide for the support of the government,' and clearly involves the idea of punishment for infraction of the law—the definite function of a penalty. O'Sullivan v. Felix, 233 U. S. 318, 324, 58 L. Ed. 980, 982, 34 Sup. Ct. Rep. 596."

It was pointed out in Fontenot v. Accardo, 278 F. 871, on page 875:

> "It will be noted that section 35 of the act authorizes an assessment, not upon liquor, but upon the illegal manufacture or sale of liquor. That is made clear by the provision that payment of the tax or penalty shall not be made in advance, and when made shall give no right to engage in the manufacture or sale of liquor. A license to engage in the business of a manufacturer of liquor, or in that of a retail liquor dealer, cannot any longer be obtained. The act so declares, and a license for such a business would be inconsistent with the whole purpose of the Eighteenth Amendment. A license tax is something which one

who engages in a lawful business or occupation may be obliged to pay. When the occupation is made unlawful, the license tax thereon is no longer collectible, but is repealed. The act does not anywhere levy any taxes, and its whole purpose is inconsistent with the theory that it was intended to continue license taxes upon manufacturers or retail liquor dealers. Section 35 is consistent with the general purpose of the act to prohibit, to punish, to forfeit, and to assess penalties. We do not think, therefore, that the assessments here involved were tax assessments."

A reading of the entire act supplemental to the National Prohibition Act reveals that it was intended solely to aid in the enforcement of national prohibition.

Referring to the first section of the Eighteenth Amendment it will be seen to be a restriction upon state and congressional power and the deduction from it is that neither the states nor Congress can enact legislation that contravenes its prohibition. There is no room for controversy as to its requirements. Its prohibition of intoxicating liquors for beverage purposes is absolute. As accessory to that prohibition is the further prohibition of their manufacture, sale or transportation within or their importation into or exportation from the United States.

The supplemental act was entitled "An Act Supplemental to the National Prohibition Act." It was passed to aid enforcement of prohibition and not to raise revenue. It authorizes and purports to regulate the prescribing of liquors for medicinal purposes, prohibits importation and manufacture until the supply then in distilleries and other bonded warehouses shall be reduced to an amount not sufficient for nonbeverage purposes, permits spirits produced in this country and exported to be returned for redeposit in bonded warehouses from which originally taken,

extends the National Prohibition Act to all the territory of the United States and makes all violators liable to the penalties provided for in the original act.

Section 5 of the Supplemental Act, which is the only section which might be considered a re-enacting clause, does not make a tax out of what was before its passage a penalty. It does not change the classification of exactions declared in Lipke v. Lederer, 259 U. S. 577, 66 L. Ed. 1061, and Regal Drug Company v. Wardell, 260 U. S. 386, 43 S. Ct. 152, 67 L. Ed. 318.

The Constitution, at the time of the passage of the act, forbade, and the National Prohibition Act denounced as crime, the manufacture, sale and transportation of intoxicating liquor for beverage purposes. The exactions in respect of such liquor were properly to be considered to enforce prohibition and to punish violations of law. The Willis-Campbell Act expressly saved all measures for enforcement, the exaction dependent on the commission of crime. The title of the Supplemental Act, as well as all the provisions of the act, indicate that the entire purpose of it was to extend, clarify and strengthen the provisions of the National Prohibition Act. It is interesting to observe that the Willis-Campbell Act was first introduced in the Senate by Senator Willis on the 20th day of June, 1921, as Senate Bill 2116, and that only on the following day, June 21, 1921, was its companion measure introduced by Mr. Campbell in the House of Representatives as H. R. 7294. In the subsequent debates in both Houses, as revealed by the Congressional Record, it turned out that the House measure was finally adopted, but nowhere did it appear that either House regarded the act as a revenue measure, which, under the Constitution, had to originate in the House of Representatives, and no question of the prerogatives of the House with regards to revenue legis-

lation was even suggested in the course of all the debates in joint committee meetings. It may further be observed that when section five of the act was codified, it was included, as Section 3, in Title 27, U: S. C. A., which title deals with intoxicating liquors and not with internal revenue.

It must be inescapably clear that whatever validity the section in question, and similar provisions of the old internal revenue laws dealing with liquor, may have gained by their re-enactment under Section 3, Title 27, U. S. C. A., was solely as penal provisions in aid of the laws enacted by Congress by virtue of its power under the Eighteenth Amendment to the Constitution of the United States. But with the expiration of their authority, by the adoption of the Twenty-first Amendment repealing the Eighteenth Amendment, all such legislation was necessarily left without any constitutional authority and became null and void.

CONCLUSION.

It is urged that under either view of the case above presented, section 1397 has been repealed and not re-enacted. In the first place, the provisions of this section and of its companion section providing when and how payment is to be made is in such direct conflict with the National Prohibition Act that it could not have been re-enacted by Section 3, Title 27, U. S. C. A. In the second place, whatever of the former revenue laws may have been re-enacted by Section 3, Title 27, U. S. C. A., were necessarily re-enacted as penal statutes in aid of prohibition, and their force and validity as such statutes necessarily expired with the repeal of the Eighteenth Amendment to the Constitution and the adoption of the Twenty-first

Amendment. Since the 5th day of December, 1933, and at the time of the return of the indictment in the instant case, on the 4th day of May, 1934, and subsequently on the date when this cause was brought to trial, on the 2nd day of December, 1935, the United States District Court for the Eastern District of Wisconsin was without jurisdiction to try the issues in the said count, for that all penal statutes in aid of national prohibition had necessarily expired and the United States was without power and authority to proceed in the matter.

For all such reasons, it is urged that the conviction of the defendants on count two of this indictment be reversed.

Respectfully submitted,

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JOHN E. DOUGHERTY,
Attorneys for Appellants.

APPENDIX 1.

AN ACT SUPPLEMENTAL TO THE NATIONAL PROHIBITION ACT.

(42 Stat. 222.)

Be It Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That the word "Person," "commissioner," "application," "permit," "regulation," and "liquor," and the phrase "intoxicating liquor," when used in this act, shall have the same meaning as they have in Title II of the National Prohibition Act.

Sec. 2. That only spiritous and vinous liquor may be prescribed for medicinal purposes, and all permits to prescribe and prescriptions for any other liquor shall be void. No physician shall prescribe, nor shall any person sell or furnish on any prescription, any vinous liquor that contains more than 24 per centum of alcohol by volume, nor shall anyone prescribe or sell or furnish on any prescription more than one-fourth of one gallon of vinous liquor, or any such vinous or spirituous liquor that contains separately or in the aggregate more than one-half pint of alcohol, for use by any person within any period of ten days. No physician shall be furnished with more than one hundred prescription blanks for use in any period of ninety days, nor shall any physician issue more than that number of prescriptions within any such period unless on application therefor he shall make it clearly apparent to the commissioner that for some extraordinary reason a larger amount is necessary, whereupon the necessary additional blanks may be furnished him. But this provision shall not be construed to limit the sale of any article the manufac-

ture of which is authorized under Section 4, Title II, of the National Prohibition Act.

If the commissioner shall find after hearing, upon notice as required in section 5 of Title II of the National Prohibition Act, that any article enumerated in subdivisions b, c, d, or e of Section 4 of Title II of said National Prohibition Act is being used as a beverage, or for intoxicating beverage purposes, he may require a change of formula of such article and in the event that such change is not made within a time to be named by the commissioner he may cancel the permit for the manufacture of such article unless it is made clearly to appear to the commissioner that such use can only occur in rare or exceptional instances, but such action of the commissioner may by appropriate proceedings in a court of equity be reviewed, as provided for in Section 5, Title II, of said National Prohibition Act: Provided, That no change of formula shall be required and no permit to manufacture any article under subdivision (E), Section 4, Title II, of the National Prohibition Act shall be revoked unless the sale or use of such article is substantially increased in the community by reason of its use as a beverage or for intoxicating beverage purposes.

No spirituous liquor shall be imported into the United States, nor shall any permit be granted authorizing the manufacture of any spiritous liquor, save alcohol, until the amount of such liquor now in distilleries or other bonded warehouses shall have been reduced to a quantity that in the opinion of the commissioner will, with liquor that may thereafter be manufactured and imported, be sufficient to supply the current need thereafter for all nonbeverage uses: Provided, That no vinous liquor shall be imported into the United States unless it is made to appear to the commissioner that vinous liquor for such nonbeverage use

produced in the United States is not sufficient to meet such nonbeverage needs: Provided Further, That this provision against importation shall not apply to shipments en route to the United States at the time of the passage of this act: And Provided Further, That the commissioner may authorize the return to the United States under such regulations and conditions as he may prescribe any distilled spirits of American production exported, free of tax and reimported in original packages in which exported and consigned for redeposit in the distillery bonded warehouse from which originally removed.

Sec. 3. That this act and the National Prohibition Act shall apply not only in the United States but to all territory subject to its jurisdiction, including the Territory of Hawaii and the Virgin Islands; and jurisdiction is conferred on the courts of the Territory of Hawaii and the Virgin Islands to enforce this act and the National Prohibition Act in such Territory and Islands.

Sec. 4. That regulations may be made by the commissioner to carry into effect the provisions of this act. Any person who violates any of the provisions of this act shall be subject to the penalties provided for in the National Prohibition Act.

Sec. 5. That all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this act; but if any act is a violation of any of such laws and also of the National Prohibition Act or of

this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other. All taxes and tax penalties provided for in Section 35 of Title II of the National Prohibition Act shall be assessed and collected in the same manner and by the same procedure as other taxes on the manufacture of or traffic in liquor.

If distilled spirits upon which the internal revenue tax has not been paid are lost by theft, accidental fire, or other casualty while in possession of a common carrier subject to the Transportation Act of 1920 or the Merchant Marine Act, 1920, or if lost by theft from a distillery or other bonded warehouse, and it shall be made to appear to the commissioner that such losses did not occur as the result of negligence, connivance, collusion or fraud on the part of the owner or person legally accountable for such distilled spirits, no tax shall be assessed or collected upon the distilled spirits so lost, nor shall any tax penalty be imposed or collected by reason of such loss, but the exemption from the tax and penalty shall only be allowed to the extent that the claimant is not indemnified against or recompensed for such loss. This provision shall apply to any claim for taxes or tax penalties that may have accrued since the passage of the National Prohibition Act or that may accrue hereafter. Nothing in this section shall be construed as in any manner limiting or restricting the provisions of Title III of the National Prohibition Act.

Sec. 6. That any officer, agent, or employee of the United States engaged in the enforcement of this act, or the National Prohibition Act, or any other law of the United States, who shall search any private dwelling as defined in the National Prohibition Act, and occupied as such dwelling, without a warrant directing such search, or who while so engaged shall without a search warrant malici-

ously and without reasonable cause search any other building or property, shall be guilty of a misdemeanor and upon conviction thereof shall be fined for a first offense not more than $1,000, and for a subsequent offense not more than $1,000 or imprisoned not more than one year, or both such fine and imprisonment.

Whoever not being an officer, agent, or employee of the United States shall falsely represent himself to be such officer, agent, or employee and in such assumed character shall arrest or detain any person, or shall in any manner search the person, buildings, or other property of any person, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than $1,000, or imprisoned for not more than one year, or by both such fine and imprisonment.

Approved, November 23, 1921.

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70074—36——1

In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 1003

HYMAN WAINER, LOUIS WAINER, GEORGE DAVIS, DONALD BLINK, AND ED. LUECK, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

No opinion was rendered by the District Court. Its charge to the jury appears at R. 117–126. The opinion of the Circuit Court of Appeals (R. 153–159) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 20, 1936 (R. 159–160). A petition for rehearing was denied April 17, 1936 (R. 175). The petition for writ of certiorari was filed May 8, 1936. The jurisdiction of this Court is in-

voked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Rule XI of the Rules of Practice and Procedure after Plea of Guilty, Verdict, or Finding of Guilt in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

I. Whether a special plea in bar to the first count of the indictment was properly overruled.

II. Whether the admission of the statement of a co-conspirator constituted reversible error.

III. Whether the records of certain civil actions were properly admitted in evidence.

IV. Whether there was sufficient proof that the seized liquor was illicit and non-tax-paid to warrant conviction.

V. Whether certain requested instructions as to the effect of the abandonment of a conspiracy were properly refused.

Petitioners also urge that Section 193, Title 26, U. S. C. A., charged in the second count of the indictment to have been violated, was repealed by the National Prohibition Act and was not reenacted, and that Section 404, Title 26, U. S. C. A., charged in the third count to have been violated, applies solely to licensed distillers and bonded warehousemen. The Government contends that these questions, not having been properly raised in either of the courts below, should not be considered here.

STATEMENT

Petitioners were indicted, with a number of others, on May 4, 1934, in the United States District Court for the Eastern District of Wisconsin on four counts of an indictment charging, in the first count, a conspiracy to violate Sections 281, 282, 290, 193, 284, 306, 307, 328, and 1181, Title 26, U. S. C. A., and to defraud the United States, by setting up stills without being registered as required by law, by engaging in the business of a distiller, rectifier, and wholesale liquor dealer without complying with the law with respect to the filing of bonds, obtaining permits, and paying taxes, and by violating the Internal Revenue laws in many other particulars. The second count charged petitioners with unlawfully carrying on the business of a wholesale liquor dealer without paying the special tax required by law. (Sec. 193, Title 26, U. S. C. A.) The third count charged them with unlawfully concealing and aiding in the concealment of alcohol on which the tax had not been paid and which had been removed to a place other than the bonded warehouse provided by law (Sec. 404, Title 26, U. S. C. A.), and the fourth count charged the removal and transportation of 1,650 gallons of alcohol with intent to defraud the Government of the tax thereon (Sec. 1181, Title 26, U. S. C. A.). (R. 2–9.)

A special plea in bar to the first count of the indictment was filed and overruled (R. 10–19).

Petitioners were convicted on all counts of the indictment (R. 24) and, after a motion for a new trial was overruled (R. 31), were sentenced as follows: The two Wainers were each given a total term of imprisonment of six years and a total fine of $12,100. Petitioners Davis and Blink were each sentenced to three months' imprisonment and fined $100, and petitioner Lueck to six months' imprisonment and $100 fine. (R. 32–33.) Upon appeal the convictions were affirmed (R. 159–160) and a petition for rehearing denied (R. 175).

A brief summary of the Government's evidence shows that petitioners Hyman Wainer and Louis Wainer maintained an office for a cattle and hide business in New London, Wisconsin, which office was used in connection with their wholesale operations in the illicit liquor traffic. They also maintained in New London and vicinity places for the storage, canning, "cutting" and sale of illicit and non-tax-paid alcohol. Among such places were the Ford garage (R. 72–73), the Buick garage (R. 70–71), the rear of Rusch's Service Station (R. 55–57), all in New London; a farm several miles north of New London, known as the Rossi farm (R. 60–62, 64); the Fuhrman home (R. 55); a house owned by defendant Wallmer and occupied by petitioner Louis Wainer where Government officers found a rectifying or cutting plant (R. 76–78); and the so-called guinea pig farm near Oshkosh, Wisconsin (R. 57).

Stills were maintained by the conspirators in various parts of the Eastern District of Wisconsin, from which stills the manufactured alcohol was hauled to New London or vicinity in fifty 5-gallon drums and at the various places named above was "cut" and run off into 1-gallon tin cans (R. 55–56, 82), in which containers it was sold to customers in Wisconsin, Minnesota, Illinois, and the Dakotas in automobile lots of 700 gallons, or more, per load (R. 58, 70). When a customer called for alcohol at one of the garages his car was taken by a defendant employee, sometimes at the instruction of petitioner Hyman Wainer (R. 79), to an alcohol storage place, where it was loaded by other defendants and returned to the garage, the load being covered and concealed, and after nightfall it was driven away by the purchaser (R. 57–58, 70).

In 1932 petitioners Hyman Wainer and Lueck made arrangements for the unloading and storing of corn sugar in carload lots at the Supple Fuel and Building Material Company's yards in Fond du Lac and also for the purchase of large quantities of coke. The corn sugar and coke were hauled away by their men, one of them being petitioner Davis. The amount of sugar averaged about 4 freight car loads a week and the coke a load or two each day, sometimes 7 or 8 tons at a time. (R. 47.) Later petitioners Hyman Wainer and Lueck purchased from the Supples three lots adjoining the Supple warehouse, saying it was a good location for

a plant as a nearby tannery and marsh would prevent the smell of mash. Lueck introduced Hyman Wainer as "the boss" and at their request the name "Balsam" was inserted in the deed as the grantee. (R. 47–48.) A building was constructed on these lots and soon thereafter a large distillery was discovered in the course of erection thereon (R. 45–46).

Among other large stills operated by the conspirators was one at Appleton, Wisconsin, to which about 275,000 pounds of corn sugar were delivered in one week in 1933. Sugar was hauled from the railroad at New London, Appleton, Butler, and Milwaukee directly to the stills located at the Litman farm, in Shawano County, the Perky farm, near Hollister, and in the Graff building, in Appleton. (R. 54, 83–85.)

About a month before the return of the indictment a search warrant was executed on the residence of petitioner Louis Wainer, at New London, where the officers found an illicit rectifying or cutting plant with considerable apparatus in the basement of the building. A large quantity of alcohol in gallon cans, rye residue and various brands of whiskey, some genuine and others contraband, were found. (R. 76–78.)

ARGUMENT

I

Petitioners Hyman Wainer and Davis contend that their special plea in bar to the first count of

the indictment should have been allowed, because it asserted their prior conviction under the National Prohibition Act on an indictment showing that the offenses in that and in the present indictment were identical in time, place, and transaction, and that under Section 5 of the Willis-Campbell Act (Sec. 3, Title 27, U. S. C.) they were immune from further prosecution.

In their plea in bar (R. 11) the above petitioners alleged that they had been previously prosecuted for the same acts at the same place involving substantially the same time under an indictment which was returned, as they alleged, in May 1932, in the Eastern District of Wisconsin. The certified copy of the indictment attached to their plea (R. 13–19) shows that it was returned in the Western District of Wisconsin in the December Term, 1931. Not only did the plea not aver that the court for the Western District of Wisconsin had jurisdiction of the parties or the subject matter, but a comparison of the two indictments clearly shows that the offenses were not identical.

To support a plea of former conviction the offenses must be the same in law and in fact. *Burton* v. *United States,* 202 U. S. 344, 380; *Gavieres* v. *United States,* 220 U. S. 338, 343. Only two of the present petitioners, namely, Hyman Wainer and Davis, were included in the former indictment. It charged a conspiracy to violate the National Prohibition Act, while the

indictment in the instant case charged a conspiracy to violate the Internal Revenue laws and to defraud the United States. The former charged the above petitioners with conspiring with many persons specifically named therein who were not co-conspirators or defendants in the present indictment. It set forth 31 overt acts (R. 15–19), all committed in the Western District of Wisconsin, by specifically named persons, none of whom were defendants in the present indictment, and all of which overt acts, the indictment alleged, were committed in violation of the National Prohibition Act.

In point of time of the commission of the offenses the two indictments differ. The former charged a conspiracy "on or about the 1st day of August, 1928, and thereafter continuously from that date to on or about the first day of April, 1932" (R. 14), while the indictment to which the special plea in bar was interposed alleges the existence of a conspiracy from July 1, 1925, up to the date of the return of the indictment, namely, May 4, 1934 (R. 2), a date long after the conviction of the petitioners in the Western District and more than two years after the date of the last overt act set forth in the indictment in that district.

The record shows many acts committed by petitioners after April 1, 1932, the last date charged in the indictment in the Western District, namely, in the latter part of 1932 and in 1933 and 1934 (R.

47–48, 52–53, 59, 64, 67, 72, 75–76, 83–86), all of which were in furtherance of the conspiracy to violate the Internal Revenue laws and to defraud the Government. As these acts were all subsequent to the conviction in the Western District they could not have been in pursuance of the conspiracy charged in that district, and many of them could not possibly have been in pursuance of that conspiracy, since the National Prohibition Act was no longer in existence at the time of the commission of these acts.

We submit that the foregoing shows conclusively the existence of a conspiracy to violate the Internal Revenue laws separate and distinct from the conspiracy to violate the National Prohibition Act charged in the former indictment, and that the court below correctly held that the plea in bar was properly overruled.

United States v. *LaFranca,* 282 U. S. 568, and *Ex parte Nielsen,* 131 U. S. 176, relied on by petitioners, are not in point, since there was here no identity of offenses or transactions.

II

Petitioners complain of the admission in evidence as against them, and without immediately and specifically limiting its application to the defendant making it, of the statement of Al Tessen (R. 89–92), a co-conspirator, alleged to have been made after the termination of the conspiracy and by way of narration of past events.

The statement was signed by defendant Tessen on May 4, 1934, the date the indictment was returned. The petitioners objected to its admission so far as it involved any other defendant than Tessen. The court ruled that the statement was admissible as one made by a defendant and that it was received as such, stating that as to defendants other than the one making it the statement was received "with an appropriate instruction with respect to it." Thereupon the petitioners excepted to the admission of "the statement itself" (R. 93). The trial lasted several days and in its final charge the court omitted any reference to the limitation of the statement, although it did charge generally that the acts or statements of individual defendants were not to be considered by the jury as affecting any other defendants "unless you find from the evidence the existence of such conspiracy, that such other defendant was a member thereof and that the acts were done and such declarations were made in pursuance of the common purpose, set out in the indictment, to effectuate the same" (R. 120). No amplification of this charge was requested and no instructions were asked to limit the application of the statement, nor was there any exception taken to the court's charge on the ground that it failed specifically to limit the application of the statement to the defendant making it.

The court below held that the statement was clearly admissible as against Tessen, but that it

could not be considered so far as the other defendants were concerned, unless it was made in furtherance of the conspiracy and before the termination of the same. It then said (R. 155–156):

> This fact the court recognized when admitting the statement, but appellants may not neglect their opportunity to request a specific charge as to the effect of any particular evidence and then profit by said neglect when the court can no longer comply with the request. Having neither excepted to the failure of the court to give a specific charge nor having offered or requested any such charge, the court cannot be charged with error. The fault lies with appellants themselves.

This, the petitioners contend, is in conflict with the court's prior decision in *Collenger* v. *United States*, 50 F. (2d) 345, where under somewhat similar circumstances it was held that when a motion is made to limit a statement received in evidence, it is the duty of the trial court promptly and specifically to limit its application to the defendant making it if found to be incompetent as to other defendants, and that it should not be left to the jury under a general charge to determine the application of the statement. In that case a number of statements were received in evidence and requests made to limit their application, and the fact that this may have been confusing and rendered it difficult for the jury to determine what statements

were made in the course of the conspiracy and to which defendants they should be limited may have influenced the decision of the court in that particular case. In any event, the mere failure of the court below to follow its prior decision affords no ground for certiorari.

The other cases relied on by petitioners do not present a real conflict, since both the trial court and the court below recognized the principle laid down therein, namely, that the acts or declarations of one conspirator, made after the conspiracy has ended and not in furtherance of the same, are not admissible in evidence against other conspirators.

Moreover, the evidence contained in the statement objected to was largely cumulative, a number of other witnesses having testified against petitioners. In view of the abundant other evidence showing petitioners' guilt they could not have been prejudiced by its admission.

III

Petitioners further complain of the admission in evidence of the records of two civil actions brought in a State court against the Wainers.

These records were offered in corroboration of the testimony of four or five witnesses who had previously testified, without objection on the part of the petitioners, to the facts contained therein, and the admission could not have been prejudicial. An Internal Revenue agent testified (R. 38–39) that he seized two large stills on the Kent

and Blink farms. Mr. and Mrs. Kent testified (R. 39–42) that they had leased the farm on which the still was found to the Wainers; that after the raid they made demand on the Wainers for damages to the barn resulting from the installation of the illicit still, and that when the demand was not satisfied they brought suit and recovered a judgment for $500, which was paid. Albert Blink testified (R. 42–43) that he had leased the farm on which the still was found by the revenue agent to the Wainers and brought suit against them for similar damages to his barn. The suit was settled for $130 and dismissed. John Morgan, attorney for Blink, testified (R. 43–44) to the filing and settling of the suit. In corroboration of these witnesses the clerk of the court was called to produce the records showing the commencement and termination of the suits as verbally testified to by the foregoing witnesses. When offered in evidence the petitioners objected to the *materiality* of the records, except as to "the satisfaction of the settlement of the claim" (R. 44). In overruling the objection the trial court stated: "I suppose if the plaintiff offered part you would have a right to insist upon the whole record. It may be received" (R. 45). Thus, the objection was directed merely to the materiality of the records and was made only to those portions which did not involve the satisfaction of the settlement, which satisfaction petitioners on cross-examination of attorney Morgan had previously introduced in the case.

In *United States* v. *Satuloff Bros.*, 79 F. (2d) 846 (C. C. A. 2d) relied on by petitioners as showing a conflict, a judgment in a civil suit was offered in support of a motion to quash an indictment. Here the records in the civil suit were offered in corroboration of the Government's witnesses and not as direct evidence or proof of the petitioners' guilt. The records disclosed nothing that had not previously been testified to without objection. The case relied on presents no such conflict as to warrant certiorari.

IV

Petitioners also contend that their convictions cannot be sustained because there was no proof offered by the Government to show that the liquor involved was not tax-paid and they rely on *Mickle* v. *United States*, 33 F. (2d) 684, (C. C. A. 8th), as showing that such proof is necessary.

While there may have been no direct proof that the taxes were not paid, the whole of the Government's case proceeded on the theory that the liquor dealt in by petitioners was non-taxpaid. The very purpose of the transactions was to defraud the Government of the tax on the liquor, and the jury by its verdict must have so found. If the taxes were paid the petitioners could have readily shown that fact. Cf. *Rossi* v. *United States*, 289 U. S. 89, 91. The point now made does not appear to have been raised in the trial court or in the assignment of errors in the appellate court. The

trial court, at the Government's request, charged the jury that the burden was not on the Government to prove failure to pay taxes (R. 126). No exception was taken to these instructions. Petitioners should not now be heard to complain that the Government has not sufficiently proved one element of its charges.

V

Complaint is further made of the refusal of the trial court to grant petitioners' requested instructions with respect to the effect of the abandonment of a conspiracy by one of its members.

It does not appear that this instruction would have been proper. The defense was a general denial of all charges. The testimony of the petitioners who took the stand, and of others who testified in their behalf, was to the effect that they knew nothing of the conspiracy and had committed no acts in furtherance thereof. The question of abandonment was in no way in issue. The court charged that before there could be a conviction the jury must find that a conspiracy existed within three years prior to May 1934, the period covered by the indictment (R. 121); that the jury's next inquiry should be which of the defendants on trial was a party to the conspiracy (R. 123), adding, for the further guidance of the jury, "the one thing that you must direct your attention to is whether the particular defendant, any particular defend-

ant, consciously, understandingly, and with knowledge participated in an act which was an act to be accomplished by the conspiracy, and he did it with the consciousness that, as such, he was participating in the furtherance of the common design" (R. 123).

The court below held (R. 158) that the inevitable meaning of this charge was that, before a defendant could be convicted, the proof must show that he was consciously engaged in the conspiracy charged within three years prior to the return of the indictment. Petitioners contend that such is not the inevitable meaning of the charge; that it is a charge upon the participation in, rather than the abandonment of, a conspiracy, and that it is not an understandable instruction of the law affording an adequate guidance for the jury. We submit that under the pleadings and evidence the requested instructions were properly refused and that the instructions given adequately protected the rights of petitioners.

VI

The contention is sought to be made that Section 193, Title 26, U. S. C. A., providing for a special tax for wholesale liquor dealers, and charged to have been violated in the second count of the indictment, was repealed by the National Prohibition Act and was not reenacted by Section 3, Title 27, U. S. C. (Section 5 of the Willis-Campbell Act); and that Section 404, Title 26, U. S. C. A., prohibiting the re-

moval and concealment of distilled spirits contrary to law, and on which convictions were sustained under the third count of the indictment, is applicable only to licensed distilleries and their established warehouses.

We submit that the petitioners are in no position to make these contentions. The record does not disclose that they were raised in or passed upon by either court below. Reference is made to them in the petition for rehearing (R. 171–173), denied without opinion, where it is claimed the points were presented in petitioners' briefs filed in the court below and complaint is made that the court ignored them. If the questions were raised in the appellate court for the first time the action of the court was proper. The questions, not having been properly raised in the courts below, should not be considered here, especially on the abstract proposition suggested by petitioners, namely, that this Court should construe the statutes and clarify their applicability. See *Gila Valley Ry. Co.* v. *Hall,* 232 U. S. 94, 98–99; *McCarthy* v. *Arndstein,* 262 U. S. 355, 360; *United States* v. *La Franca,* 282 U. S. 568, 576–577. The present contentions of the petitioners are obviously an afterthought. They are clearly not in a position to seek the setting aside of verdicts against them upon grounds which were not properly raised below and which, presenting questions of statutory construction, obviously do not involve plain errors. Cf. *United States* v.

Atkinson, No. 265, present term, decided by this Court February 3, 1936.

CONCLUSION

The case was correctly decided below and there is no such conflict of decisions as to warrant further review by this Court. We therefore respectfully submit that the petition for writ of certiorari should be denied.

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BRIEN MCMAHON,
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MAHLON D. KIEFER,
Special Assistant to the Attorney General.

MAY 1936.

U. S. GOVERNMENT PRINTING OFFICE: 1936

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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 51

HYMAN WAINER, LOUIS WAINER, GEORGE DAVIS, DONALD BLINK, AND ED. LUECK, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 153–159) is reported in 82 F. (2d) 305.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 20, 1936 (R. 159–160). A petition for rehearing was denied April 17, 1936 (R. 175). The petition for writ of certiorari was filed May 8, 1936, and granted June 1, 1936, lim-

ited to the question whether the statute upon which the second count of the indictment was based was repealed by the National Prohibition Act and not reenacted (R. 177). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Rule XI of the Rules of Practice and Procedure after Plea of Guilty, Verdict, or Finding of Guilt in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTION PRESENTED

The question presented, as limited by the writ of certiorari, is whether Revised Statutes, Section 3242, *infra,* prescribing a penalty for carrying on the business of a wholesale liquor dealer without having paid the special tax as required by law, and upon which the second count of the indictment is based, was repealed by the National Prohibition Act and not reenacted.

Petitioners also present, for the first time, the additional question whether, if the above statute was reenacted, it has been rendered inoperative by the adoption of the Twenty-first Amendment.

STATUTES INVOLVED

Revised Statutes, Section 3242 (U. S. C., Title 26, Section 1397), provides, in part:

> Any person who shall carry on the business of a rectifier, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt

> liquors, retail dealer in malt liquors, or manufacturer of stills without having paid the special tax as required by law shall, for every such offense, be fined not less than $100 nor more than $5,000 and imprisoned not less than thirty days nor more than two years. * * *

National Prohibition Act, c. 85, 41 Stat. 305, 317–318, Title II, Section 35, so far as here material, declares:

> All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This Act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve anyone from criminal liability, nor shall this Act relieve any person from any liability,

civil or criminal, heretofore or hereafter incurred under existing laws. * * *

Act Supplemental to the National Prohibition Act (Act of Nov. 23, 1921, c. 134, 42 Stat. 222, 223), Section 5, provides, in part:

> That all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act; but if any act is a violation of any of such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other. All taxes and tax penalties provided for in section 35 of Title II of the National Prohibition Act shall be assessed and collected in the same manner and by the same procedure as other taxes on the manufacture of or traffic in liquor. * * *

STATEMENT

Petitioners were indicted, with a number of others, on May 4, 1934, in the United States District Court for the Eastern District of Wisconsin on four counts of an indictment charging a conspiracy to violate various provisions of the In-

ternal Revenue laws, and to defraud the United States, by setting up stills without being registered as required by law, by engaging in the business of a distiller, rectifier, and wholesale liquor dealer without complying with the law with respect to the filing of bonds, obtaining permits, and paying taxes, and by violating the Internal Revenue laws in many other particulars. They were also charged with the substantive offenses of unlawfully concealing and aiding in the concealment of alcohol on which the tax had not been paid and which had been removed to a place other than the bonded warehouse provided by law, and of removing and transporting 1,650 gallons of alcohol with intent to defraud the Government of the tax thereon.

The second count of the indictment, here involved, charged petitioners with unlawfully carrying on the business of a wholesale liquor dealer without paying the special tax required by law (R. 2–9).

Petitioners were convicted on all counts of the indictment (R. 24) and, after a motion for a new trial was overruled (R. 31), were sentenced as follows: The two Wainers were each given a total term of imprisonment of six years and a total fine of $12,100. The sentence imposed on each on the second count was two years' imprisonment and a fine of $1,000. Petitioners Davis and Blink were each given a general sentence of three months' imprisonment and a fine of $100, and petitioner

Lueck a general sentence of six months' imprisonment and $100 fine (R. 32–33). Upon appeal the convictions were affirmed (R. 159–160) and a petition for rehearing denied (R. 175). On June 1, 1936, this Court granted a writ of certiorari, limited to the question as above stated (R. 177).

SUMMARY OF ARGUMENT

Petitioners' contention that Revised Statutes, Section 3242, *supra,* was repealed by the National Prohibition Act, *supra,* and not reenacted by the Act supplemental to the National Prohibition Act, *supra,* is foreclosed by the decisions of this and other Federal courts.

This Court had held in *United States* v. *Yuginovich*, 256 U. S. 450, that the National Prohibition Act in effect repealed some of the preexisting internal revenue laws, at least so far as the penalties and certain requirements with respect to the operation of distilleries were concerned. Thereafter Congress passed the Act supplemental to the National Prohibition Act, of which the pertinent provisions are printed *supra.* In *United States* v. *Stafoff; Brooks* v. *United States;* and *United States* v. *Remus,* decided together in 260 U. S. 477, this Court held that by Section 5 of the Supplemental Act the former internal revenue laws were reenacted, including Revised Statutes, Section 3242, here involved. This was also the ruling of other Federal courts, with the exception of the case of *Bailey* v. *United States,* 5 F. (2d) 437, relied on by

petitioners, in which the Circuit Court of Appeals for the Fifth Circuit held that the tax imposed on wholesale liquor dealers was repealed by the National Prohibition Act and was not reenacted. This decision was in effect later overruled by the same court in *Anderson* v. *United States,* 30 F. (2d) 485, where it was held, on the authority of this Court's decision in the *Remus* case, *supra,* that it was still an offense to carry on the business of a wholesale liquor dealer without payment of the special tax.

Petitioners' further contention, now made for the first time, that if the statute was reenacted it fell with the repeal of the Eighteenth Amendment was not passed upon by the courts below, nor was the point included in the question as limited by the writ of certiorari. But if, notwithstanding this fact, the Court should decide to consider the question because jurisdictional or otherwise fundamental, we submit that the contention is without merit. This prosecution was not based on any statute ever a part of the prohibition laws, but on the revenue laws. These laws were based on the taxing powers and Congress did not need the support of the Eighteenth Amendment to pass them originally or to reenact them. It was clearly the intention of Congress to retain these laws in force as revenue measures along with the prohibition laws. Under petitioners' argument no internal

revenue laws could have been in force, as such, during the prohibition era or since, despite the fact that after the enactment of the Supplemental Act the Government, with the approval of Congress and the courts, continually used these laws as revenue measures and to enforce the liquor taxes as distinguished from enforcing the prohibition laws. These revenue laws were in force at all times as separate and distinct taxing statutes since their original enactment, except for a short hiatus between the enactment of the National Prohibition Act and the Supplemental Act, and they have remained in force notwithstanding the repeal of the Eighteenth Amendment.

Petitioners were convicted upon a valid indictment based on a statute in full force and effect, and the judgment of the court below should accordingly be affirmed.

ARGUMENT

THE STATUTE UNDER WHICH PETITIONERS WERE INDICTED AND CONVICTED WAS IN FULL FORCE AND EFFECT

Petitioners contend that Revised Statutes, Section 3242, for a violation of which they were convicted under the second count of the indictment, was repealed by the adoption of the Eighteenth Amendment and the passage of the National Prohibition Act, and was not reenacted by the provisions of the Act supplemental to the National Pro-

hibition Act, which was commonly known as the Willis-Campbell Act. They further contend that even if the statute was reenacted by the Supplemental Act, it was reenacted not as a revenue measure, but as a penal provision in aid of the enforcement of national prohibition, and therefore was rendered inoperative by the adoption of the Twenty-first Amendment.

In Section 35, Title II, of the National Prohibition Act, *supra*, Congress had provided that all laws that were inconsistent with the Act were repealed only to the extent of such inconsistency and that the regulations therein provided for the manufacture of and traffic in liquor should be construed as in addition to existing laws. It was further provided that the Act should not relieve anyone from paying any taxes or other charges imposed upon the manufacture of or traffic in liquor; that no liquor revenue stamps or tax receipts for any illegal manufacture or sale of liquor should be issued in advance, but that upon evidence of such illegal manufacture or sale a tax should be assessed against and collected from the person responsible therefor in double the amount then provided by law, with the addition of certain named penalties.

Congress had evidently intended by these provisions to keep the old internal revenue laws in force along with the National Prohibition Act. But a controversy soon arose as to whether or not some of the provisions of the preexisting laws

were so inconsistent with the new Act as to effect their repeal. This controversy resulted in a conflict of decisions in the courts below. The matter finally reached this Court in *United States* v. *Yuginovich et al.*, 256 U. S. 450, where the defendants were charged with violating Revised Statutes, Sections 3257, 3279, 3281, and 3282 (U. S. C., Title 26, Sections 1155 (f), 1182, 1184, and 1185) by attempting to defraud the Government of the tax upon spirits distilled and by failing to meet certain requirements and committing certain offenses in connection with the operation of a distillery. A motion to quash and a demurrer to the indictment were sustained by the trial court on the ground that the sections in question had been repealed. In affirming that decision this Court pointed out that these statutes had long been a part of the Federal internal revenue legislation and were passed under the authority of the taxing power of Congress at a time when the manufacture and sale of liquor were legal; that the Government had derived a large amount of revenue from taxing the liquor business which it sought to realize and protect by a system of laws of which the above sections were a part, but that this policy was changed by the adoption of the Eighteenth Amendment and the passage of attendant legislation prohibiting the manufacture and sale of liquor for beverage purposes. With reference to the taxes retained in Section 35 of the National Pro-

hibition Act the Court said that Congress could under the broad authority of the taxing power tax intoxicating liquors notwithstanding their production was prohibited, and the fact that the statute had a moral end in view as well as that of raising revenue presented no valid constitutional objection to its enactment, but that, while Section 35, considered by itself, was strongly indicative of an intention to retain the old laws, Congress did not intend, in view of the Eighteenth Amendment and the Prohibition Act, to retain the penalty in the old laws when it had provided a lesser penalty in the new Act for attempting to defraud the Government of a tax, and that likewise it did not intend to keep in force the other requirements with respect to distilleries when the production of liquor for beverage purposes was no longer legal.

Congress, however, was not content with this situation. Almost immediately it passed the Act supplemental to the National Prohibition Act, Section 5 of which is printed at p. 4, *supra*.

This statute came before this Court for construction in *United States* v. *Stafoff; Brooks* v. *United States; United States* v. *Remus*, 260 U. S. 477, in which it was held that it was the intention of Congress by the enactment of the Supplemental Act to restore or reenact the internal revenue laws that had theretofore existed, but that Section 5 thereof was not retroactive so as to cover and penalize matters that had transpired prior to the

passage of the supplemental Act. Some of the statutes involved in the *Stafoff* and *Remus* cases were the same as those passed upon in the *Yuginovich* case. That involved in the *Remus* case was Revised Statutes, Section 3242, which is the provision under consideration in the instant case. After referring to Section 5 of the Supplemental Act as having been passed with reference to its decision in the *Yuginovich* case, the Court said (p. 480):

> The decision in *United States* v. *Yuginovich* must stand for the law before November 23, 1921. In that case, besides what we have mentioned, it was held also that the penalty imposed by Rev. Stats. Sec. 3257 on a distiller for defrauding the United States of the tax on the spirits distilled by him was repealed. So far as the liquor is for beverage purposes the same reasoning must apply to the penalty in Sec. 3242 for carrying on the business of rectifier or wholesale or retail liquor dealer without having paid the special tax imposed by law.
>
> But the Supplemental Act that we have quoted puts a new face upon later dealings. From the time that it went into effect it had the same operation as if instead of saying that the laws referred to shall continue in force it had enacted them in terms. The form of words is not material when Congress manifests its will that certain rules shall govern henceforth. *Swigart* v. *Baker*,

> 229 U. S. 187, 198. Of course Congress may tax what it also forbids. 256 U. S. 462. For offenses committed after the new law, *United States* v. *Yuginovich* can not be relied upon. Three counts in the *Remus* case charge carrying on the business mentioned up to April 1, 1922, and therefore are governed in part by the Supplemental Act. So far as the decision of the Court below neglected this distinction it was wrong. * * *

There can be no doubt, therefore, that the statute under which petitioners were convicted upon count two of the indictment was reenacted by the Supplemental Act.

Petitioners rely on *Bailey* v. *United States,* 5 F. (2d) 437 (C. C. A. 5th), in which it was held that the tax imposed upon wholesale liquor dealers by Revised Statutes, Section 3244 (U. S. C., Title 26, Section 1394 (a)), which tax the petitioners in the instant case were charged with having failed to pay, was repealed by the National Prohibition Act and was not reenacted. Although decided after the enactment of the Supplemental Act and the decision of this Court in the *Yuginovich* case, no reference is made to either in the opinion. In their support of the decision in the *Bailey* case petitioners point to the statute under which they were convicted of having failed to pay the special wholesale liquor dealers tax and to U. S. C., Title 26, Section 1402, requiring that special taxes shall be

paid in advance on the first day of July in each year, or on commencing any trade or business, and they urge that these provisions were in such irreconcilable conflict with the National Prohibition Act and the Supplemental Act that there could have been no reenactment, because the latter Acts prohibited the manufacture and sale of liquor and made compliance with the former laws with respect to the payment of taxes impossible by prohibiting the acceptance of special taxes and the issuance of receipts therefor in advance. The same argument was presented to this Court in *United States* v. *One Ford Coupe,* 272 U. S. 321, where the $2.20 per gallon production tax on distilled spirits was involved. This Court said (p. 327):

> These supervening obstacles to paying the tax do not, however, establish that the intention was not to continue it in force. A law which imposes a tax on intoxicating liquor, whether legally or illegally made, is not in conflict with another law which prohibits the making of any such liquor. Compare *United States* v. *Stafoff,* 260 U. S. 477; *Vigliotti* v. *Pennsylvania,* 258 U. S. 403. There is no direct conflict between any provision of the prohibitory legislation and the imposition of the tax here in question.

See also *United States* v. *Yuginovich, supra,* p. 462; *United States* v. *Stafoff, supra,* p. 480, holding that Congress may tax what it also forbids.

The *Bailey* case is the only one coming to our attention where it has been held that any of the pre-

existing revenue laws had not been reenacted. Moreover, the same Circuit Court of Appeals, in *Anderson* v. *United States,* 30 F. (2d) 485, later held, on the authority of the *Remus* case, that it was still an offense to carry on the business of retail liquor dealer without payment of the special tax. The court said (p. 486):

> The offense is alleged to have been committed since the adoption of the Act of November 23, 1921 (42 Stat. 222), popularly referred to as the Willis-Campbell Act. It is settled that it is still an offense to carry on the business of retail liquor dealer without having paid the license tax for so doing, although no tax may be in fact paid, nor may permission be granted to conduct the business. *U. S.* v. *Remus et al.,* 260 U. S. 477, * * *.

To the same effect is *Forcman* v. *United States,* 28 F. (2d) 768, 769 (C. C. A. 8th).

This same view is taken by the courts below of other sections of the revenue laws. In the following cases it was held that Revised Statutes, Section 3296 (U. S. C., Title 26, Section 1287), providing a penalty for the removal and concealment of tax-unpaid distilled spirits, was reenacted by the Supplemental Act: *Harrison* v. *United States,* 25 F. (2d) 1019 (C. C. A. 4th); *Benton* v. *United States,* 28 F. (2d) 695, 696 (C. C. A. 4th); *Whitehead* v. *United States,* 73 F. (2d) 896 (C. C. A. 5th), reversed on other grounds.

In *Neely* v. *United States,* 2 F. (2d) 849, 852 (C. C. A. 4th), and *Rossi* v. *United States,* 60 F. (2d) 955 (C. C. A. 7th), affirmed in 289 U. S. 89, it was held that Revised Statutes, Section 3281 (U. S. C., Title 26, Section 1184) and other provisions of the revenue laws regulating the operation of stills so as to insure collection of the tax, were restored by the Supplemental Act. In the latter case the Circuit Court of Appeals said (p. 955):

> We think that the effect of the Willis-Campbell Act was to re-enact the provisions of the internal revenue laws relied upon by the government in this case. Difficulties or even impossibilities in complying with the provisions of the revenue laws thus re-enacted, do not establish that the intention of Congress was not to continue those provisions in force. There is no direct conflict between the prohibitory legislation and the provisions of the revenue laws here involved.

It will thus be seen that the overwhelming weight of authority is against petitioners' contention that Revised Statutes, Section 3242, was not reenacted by the Act supplemental to the National Prohibition Act.

Petitioners now further contend, however, that even if the statute in question and other preexisting revenue laws were reenacted, they were reenacted not as revenue measures, but as penal pro-

visions in aid of the enforcement of national prohibition, and therefore had been rendered inoperative by the adoption of the Twenty-first Amendment repealing the Eighteenth Amendment and the laws enacted thereunder.

This point was not included in the petition for rehearing in the court below, where the question that the statute had been repealed and not reenacted was raised for the first time (R. 171), nor was it referred to in the petition for certiorari or supporting brief. These documents stressed the scope and effect of the Supplemental Act and the conflict of decisions thereon. Consequently, the point was not included in the question as limited by the writ of certiorari. Not only was the point not raised in the application for certiorari nor included in the question as limited by this Court, but the courts below should have been given an opportunity to pass upon the point. See *United States* v. *LaFranca,* 282 U. S. 568, 576; *Various Items* v. *United States,* 282 U. S. 577, 582; *Webster Elec. Co.* v. *Splitdorf Co.,* 264 U. S. 463.

But even if the question be regarded as jurisdictional or otherwise fundamental and should therefore be considered (*Gila Valley Ry. Co.* v. *Hall,* 232 U. S. 94, 98–99; *McCarthy* v. *Arndstein,* 262 U. S. 355, 360), we nevertheless submit that petitioners' contention cannot prevail.

The basis of their contention is that the National Prohibition Act outlawed all traffic in intoxicating

liquor for beverage purposes; that the Supplemental Act was passed to aid enforcement of prohibition and not to raise revenue, and that, while Section 5 of the latter Act might be considered a reenacting clause, it did not make a tax out of what was held to be a penalty in *Lipke* v. *Lederer,* 259 U. S. 557, and *Regal Drug Co.* v. *Wardell,* 260 U. S. 386. The argument is that Section 5 was so commingled with and a part of the supplemental Act, whose sole purpose was to extend, clarify, and strengthen the National Prohibition Act, that any laws restored by it were restored with a view to aiding prohibition, as distinguished from raising revenue, and that these laws, like others passed pursuant to the Eighteenth Amendment, necessarily fell with the repeal of that Amendment.

Notwithstanding the fact that Section 5 appeared in the Supplemental Act, it may be said that that part which reenacted the preexisting revenue laws was complete within itself. It was a general provision entitled to stand upon its own foundation. Congress did not need the support of the Eighteenth Amendment to restore the revenue laws. The original revenue laws were not based on the Eighteenth Amendment and prohibition legislation, but on the revenue powers of Congress, and this power continued to exist after prohibition, either to enact new laws or to restore old ones.

But whatever may have been the basis of Section 5, it clearly expressed the intention of Congress to

retain the revenue laws in force side by side and along with the Prohibition Act. That less revenue was derived through them during the prohibition era and that they were sometimes used as aids to prohibition is immaterial. They were restored in their full vigor as revenue measures and as independent taxing statutes and were available and frequently used as such during the prohibition period with the approval of Congress and the courts. It was probably through an inadvertence in the passage of the National Prohibition Act that the revenue laws were repealed. Despite the fact that Congress had stated in general terms in that Act that it was its intention to retain the taxing statutes, it was found by this Court in the *Yuginovich* case, *supra,* that certain provisions of the revenue laws had been repealed. Congress hastily moved to restore them. They have so remained ever since through many Congresses and have been construed and upheld by the courts.

It is now too late, in view of the Congressional enactments and the decisions of the courts, for petitioners to argue that there was no revenue tax, as such, on liquor during the prohibition era when its manufacture and traffic were prohibited. Not only did Section 35, Title II, of the National Prohibition Act, provide that, "This Act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic

in such liquor", but Section 5 of the Supplemental Act explicity re-enacted all laws in regard to the taxation of intoxicating liquor not in direct conflict with the Prohibition Act. In the *Ford Coupe* case, *supra,* it was said (pp. 326–327):

> The continued existence of taxes upon illicit liquor is indicated in Sec. 35 of the National Prohibition Act (p. 317), which provides: "This Act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor." That Congress in enacting that law would intentionally have exempted illicit liquor from taxation is not likely. Moreover, we are not dealing with the construction of the law as enacted in 1919. The Willis-Campbell Act, November 23, 1921, c. 134, Sec. 5, 42 Stat. 222, 223, supplemental thereto, continued in force or reenacted, by express provision, all laws in regard to the taxation of intoxicating liquor not directly in conflict with the prohibitory legislation. Furthermore, the Revenue Act of 1921, November 23, 1921, c. 136, Sec. 600, 42 Stat. 227, 285, enacted on the same day, shows that Congress had no intention then of relieving liquor from taxation merely because illegally dealt with. For it provided specifically that if distilled spirits, tax-paid for non-beverage purposes, be diverted to beverage purposes, an additional tax of $4.20 per gallon must be paid, although under the law such diversion could not be made legally.

Again, in answer to contentions similar to those made by petitioners here, the Court said (p. 328):

> The claimant contends that the so-called tax on illicitly distilled spirits theretofore imposed ceased to be a tax and became in law a penalty, when the enactment of the National Prohibition Act changed the purpose of the tax from raising revenue to preventing manufacture, sale, and transportation; and that to enforce such penalty by forfeiture of the property rights of innocent third parties would be a denial of due process of law. It is true that the use of the word "tax" in imposing a financial burden does not prove conclusively that the burden imposed is a tax; and that when it appears from its very nature that the imposition prescribed is a penalty solely, it must be treated in law as such. But the imposition here in question is not of that character. A tax on intoxicating liquor does not cease to be such because the sovereign has declared that none shall be manufactured, and because the main purpose in retaining the tax is to make law-breaking less profitable. What was sought to be enforced and held to be a penalty in *Lipke* v. *Lederer,* 259 U. S. 557, 561, was the so-called double tax. Here, we are dealing with the basic production tax.
>
> With respect to the character of the impositions called taxes there is nothing in either the Revenue Acts or the Prohibition Act which makes any distinction between

> the product of legal and illegal distillation. The Acts left in effect the basic tax of $2.20 per gallon, which was and is a true tax on the product, whether legally or illegally distilled, and added to it the additional amounts in case of illegal distillation or diversion to illegal uses. These additional amounts also are called taxes by Congress, and were understood by it to be such. Whether they were intrinsically penalties and should be treated as such we need not determine. The basic tax of $2.20 a gallon on liquor illegally produced is not imposed because of illegality, but despite of it.

In the later case of *United States* v. *LaFranca,* 282 U. S. 568, 573, which dealt with specific penalties and taxes converted into penalties by double imposition under Section 35 of the National Prohibition Act, the Court distinguished the *Ford Coupe* case by stating that its purpose "was to enforce a simple tax, not one which had been, as here, converted, by a change of its nature, into a penalty." *Various Items* v. *United States,* 282 U. S. 577, involved the forfeiture under the revenue laws of premises on which a distillery business had been conducted with intent to defraud the Government of the tax on the spirits distilled. The fraud consisted in the diversion of alcohol for beverage purposes without payment of the $6.40 per gallon diversion tax. The Court said (p. 579): "Included in the $6.40 is the basic tax of $2.20, which is not a

penalty but a true tax. Only the remaining part of the $6.40 may be regarded as a penalty." See also *United States* v. *Rizzo,* 297 U. S. 530, 533.

There is no difference in principle between the taxes involved in the above cases and a wholesale liquor dealer's tax. If the basic production tax remained in effect after the Prohibition Act was enacted and could be enforced in its original character as a tax, notwithstanding the double imposition features of Section 35, it necessarily follows that the tax here involved also remained in force as a tax, and not as a penalty as petitioners contend. The fact is that these internal revenue liquor taxes, and the laws enacted to insure their collection, were in force at all times during the prohibition era and were not affected by the repeal of the Eighteenth Amendment and the prohibitory liquor laws.

If petitioners' contention be sound then it must follow that there are no internal revenue liquor laws now in force, notwithstanding the fact that during the prohibited period, after the enactment of the Supplemental Act, the Government continually used these laws as revenue measures and to enforce the liquor taxes, as distinguished from enforcing the prohibition laws, the same as before the advent of prohibition. The Government regarded these two sets of laws—the revenue Acts and the prohibitory liquor laws—as concurrently in force and used them at its option or election,

proceeding first under one and then the other, both as to prosecution and as to matters of forfeiture. This action had the approval of Congress and the courts and petitioners should not now be heard to say that it was improper. Among such internal revenue cases receiving the approval of this Court were the *Ford Coupé* case, *supra,* involving the forfeiture under Revised Statutes Section 3450 (U. S. C., Title 26, Section 1441), of an automobile used in the deposit and concealment of distilled spirits with intent to defraud the Government of the tax thereon; *Various Items* v. *United States, supra,* a proceeding under Revised Statutes, Sections 3257 and 3281 (U. S. C., Title 26, Sections 1155 (f) and 1184), to forfeit a distillery and other premises used in a distilling business in fraud of the tax, and *Rossi* v. *United States,* 289 U. S. 89, a prosecution for failure to comply with various internal revenue laws relating to the possession and operation of stills.

Petitioners point to no decision holding that the internal revenue laws fell with the repeal of the Eighteenth Amendment and prohibition legislation, and we know of none. On the other hand, those courts which have passed upon the subject have declared the former laws in full force and effect. In *Benton* v. *United States,* 70 F. (2d) 24, the Circuit Court of Appeals for the Fourth Circuit held that a prosecution under Revised Stat-

utes, Sections 3296 and 3450 (U. S. C., Title 26, Secs. 1287, 1441), for the removal and concealment of tax-unpaid distilled spirits and other commodities with intent to defraud the Government of the tax thereon, was not affected by the repeal of the Eighteenth Amendment. In *United States* v. *Anderson,* 8 F. Supp. 88 (S. D. N. Y.), it was held that the repeal of the Eighteenth Amendment did not render inoperative Revised Statutes, Section 3258 (U. S. C., Title 26, Sec. 1162), requiring the registering of stills. In *United States* v. *Wilson,* 9 F. Supp. 968 (W. D. N. Y.), the court said (p. 969): "Those statutes which did not rest upon the grant of authority to Congress by virtue of the Eighteenth Amendment were not affected by the adoption of the Twenty-First Amendment." In *United States* v. *Bacon,* 7 F. Supp. 590 (W. D. Tex.), it was held that the internal revenue laws punishing the possession of an unregistered still, carrying on the business of a distiller without giving bond or with intent to defraud the United States of the tax, and making mash at a place other than an authorized distillery, rest upon the power of Congress to levy an excise and not on the Eighteenth Amendment, and that it was not intended that these laws, or that part of the Supplemental Act which reenacted them, should fall with the Prohibition Act which was in effect repealed by the Twenty-First Amend-

ment. See also *United States* v. *Columbia Fruit Products Co.*, 10 F. Supp. 873 (E. D. Pa.).

If these cases were correctly decided petitioners' convictions must stand, for there is no distinction in principle between the statutes there involved and one intended to enforce collection of the tax imposed on wholesale liquor dealers. They are all aimed at the collection of taxes and prevention of frauds on the revenue.

The Congressional intent, judicial decisions, and rules of statutory construction all weigh against petitioners' contention. This prosecution was not based on any statute ever a part of the prohibition laws; but on the internal revenue laws. These revenue laws were in force at all times as separate and distinct taxing statutes since their original enactment, except for a short hiatus between the enactment of the National Prohibition Act and the Supplemental Act (*United States* v. *Stafoff, supra,* p. 480) and they have remained in force notwithstanding the repeal of the Eighteenth Amendment.

So far as petitioners Davis, Blink, and Lueck are concerned, it would seem that they are in no position to complain even if the convictions on the second count were erroneous. The sentence imposed on each was a general one and did not exceed that imposable under the first count of the indictment upon which they were convicted. *Abrams* v. *United States,* 250 U. S. 616, 619; *Brooks* v. *United States,* 267 U. S. 432, 441.

CONCLUSION

Petitioners were convicted upon a valid indictment based on a statute in full force and effect. We, therefore, respectfully submit that the judgment of the court below should accordingly be affirmed.

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OCTOBER 1936.

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SUPREME COURT OF THE UNITED STATES.

No. 51.—October Term, 1936.

Hyman Wainer, et al., Petitioners, *vs.* The United States of America.	On writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[November 9, 1936.]

Mr. Justice Roberts delivered the opinion of the Court.

The petitioners were convicted and sentenced in the District Court under an indictment, the second count of which charged them with conducting the business of wholesale liquor dealers without having paid the special tax imposed by the federal revenue laws. The judgment was affirmed by the Circuit Court of Appeals.[1] Certiorari was granted limited to the question whether the statute upon which the second count of the indictment was based was repealed by the National Prohibition Act[2] and has not been reenacted.

Many of the existing revenue acts imposing taxes in respect of manufacture and sale of intoxicating liquors were superseded by the National Prohibition Act.[3] The effect of Section 5 of the Willis-Campbell Act[4] was to reenact all such laws in existence when national prohibition became effective, save such as were in direct conflict with any provision of the National Prohibition Act or the Willis-Campbell Act.[5] The statutes taxing the business of conducting a wholesale liquor business and imposing the penalties for so doing without the payment of the tax[6] were not in direct conflict with the prohibition act and were, therefore, reenacted.[7] The diffi-

[1] 82 F. (2d) 305.

[2] Act of October 28, 1919, c. 85, 41 Stat. 305, U. S. C. Tit. 28, *passim*.

[3] *United States* v. *Yuginovich*, 256 U. S. 450.

[4] Nov. 23, 1921, c. 134, 42 Stat. 222, U. S. C. Tit. 27, § 3.

[5] *United States* v. *Stafoff, et al.*, 260 U. S. 477.

[6] R. S. 3242; U. S. C. Tit. 26, § 1397.

[7] *United States* v. *Remus*, 260 U. S. 477, 479, 480. The decision to the contrary by the Circuit Court of Appeals for the Fifth Circuit in *Bailey* v. *United States*, 5 F. (2d) 437, was not followed by the same court in the later case of *Anderson* v. *United States*, 30 F. (2d) 485.

culty of paying the excise upon the privilege of carrying on a business which is prohibited does not preclude the prescription of sanctions for non-payment.[8] Petitioners insist it is a contradiction in terms to say the laws of the United States at the same time prohibit and license an occupation. The contention is based on misconception of the nature of the exaction. The United States has not licensed the liquor business but, as is clearly within its power, has laid an excise upon the doing of the business whether lawfully or unlawfully conducted.[9]

The judgment is affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[8] *United States* v. *One Ford Coupe*, 272 U. S. 321, 327.

[9] *United States* v. *Constantine*, 296 U. S. 287, 293.